ARTICLES

MARKET CORRECTIVE RULEMAKING: DRAWING ON EU INSIGHTS TO RATIONALIZE U.S. REGULATION

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When justifying the government's role in intervening in the free market, economists and legal scholars alike point to the problem of "market failures": laissez-faire capitalism may not produce optimal outcomes in certain cases, and government interventions can promote overall market efficiency. The existence of such market failures is not terribly controversial; the question whether government regulators can correctly identify these flaws and devise appropriate solutions, by contrast, is significantly more contentious. Unfortunately, under the existing regulatory framework, government officials are not especially well positioned to make these difficult determinations. Congress does not, as a general matter, consider the economic costs and benefits of statutes designed to correct perceived market flaws. Administrative agencies generally do consider these costs and benefits, but they seldom carefully reassess existing interventions and often lack the statutory authorization to tailor regulatory programs to respond to changing market forces. The unfortunate result of this dynamic is partisan gridlock and regulatory inertia: conservatives in Congress refuse to authorize new regulatory programs, fearing that any such intervention will prove impossible to reverse, and progressives strongly defend existing market interventions, fearing that acknowledging any inefficiencies will validate the anti-regulatory narrative.

This Article seeks to alter that dynamic, offering a new approach to regulation designed

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to correct market failures. It proposes a new, optional track for rulemaking aimed at remedying perceived market flaws, dubbed "market corrective rulemaking." In developing the proposal, this Article calls upon several innovations adopted by the European Union. Given the significant differences between the U.S. and EU regulatory regimes, this Article adapts these procedures for a U.S. context, drawing from the comparative strengths of both systems. Under market corrective rulemaking procedures, Congress would delegate sweeping powers to agencies to correct certain market flaws, but it would impose certain procedural requirements, including pre-notice of proposed rulemaking outreach to relevant stakeholders and comprehensive retrospective review, and would require the rulemaking agencies to assess both economic costs and benefits and disruption to existing market forces. Though Congress would possess complete discretion in determining whether to direct agencies to undertake market corrective rulemaking or instead rely on the informal rulemaking default, the existence of such an alternative could help resolve much of the prevailing gridlock, offering an opportunity for narrowly tailored market interventions that can be readjusted over time.

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INTRODUCTION

In recent years, as federal deficits have soared in the face of decreased revenues resulting from the Great Recession, politicians and activists associated with the so-called "Tea Party" have become increasingly aggressive in attempting to contain the growth of the federal government, even rolling back some of the regulatory reforms of the past century.[1] Pointing to the malaise besetting numerous member states of the European

1. *See, e.g.*, Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES MAG. (Nov. 26, 2010), http://www.nytimes.com/2010/11/28/magazine/28FOB-idealab-t.html?pagewanted =all&_r=0 (describing, inter alia, Senator Mike Lee's proposition to dismantle the Department of Education (DOE) and Department of Housing and Urban Development on constitutional grounds).

Union and other nations whose governments have taken an aggressive role in intervening in the free market, conservatives contend that strong regulation stifles economic growth.[2] Meanwhile, progressives pin the blame for the recession on financial firms and large corporations and call for expanded regulation to avert another economic collapse.[3] Caught in the middle of such competing ideologies, a rational, objective policymaker would struggle mightily with determining whether to constrain the federal regulatory leviathan or yoke the power of the state to curb the depredations of industry.

Though the Great Recession brought arguments concerning the appropriate role of government to the forefront, what is perhaps more notable than the intense partisan vitriol surrounding debates about the proper role of government is the scant attention paid to such fundamental issues in preceding decades. Indeed, even the Constitutional Framers were relatively quiescent on the question of the appropriate scope of federal power, reserving potentially awesome powers for the U.S. Congress in the Commerce Clause[4] and Spending Clause[5] but trusting pluralistic competition among factions to prevent any special interest or small group of interests from amassing sufficient power in the federal government to advance its goals at the expense of the broader public.[6]

As public choice theorists have demonstrated, this assumption was perhaps incorrect. Though any given entity likely cannot control the entire federal apparatus, the subdivision of powers amongst committees in Congress and agencies in the administrative state ensures that special interests need only lobby key members of Congress and unelected federal bureaucrats with relevant jurisdiction to procure special governmental

2. *See, e.g.*, SAMUEL GREGG, BECOMING EUROPE 17 (2013); EDD S. NOELL ET AL., ECONOMIC GROWTH 95–97 (2013).

3. *See, e.g.*, JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY 33–34 (2012); Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES MAG. (Sept. 2, 2009), http://www.nytimes.com/2009/09/06/magazine/06Economic-t.html.

4. U.S. CONST. art. I, § 8, cl. 3.

5. U.S. CONST. art. I, § 8, cl. 1.

6. As James Madison proclaimed in *The Federalist*:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

THE FEDERALIST NO. 10 (James Madison).

favors—the so-called "iron triangles" phenomenon.[7] Furthermore, as Mancur Olson showed, entities that experience concentrated benefits or harms as a result of federal intervention have a strong incentive to engage in such lobbying efforts, whereas those that experience more diffuse effects—often the public at large—have no such incentive.[8] Given this dynamic, it is not terribly surprising that the federal government steadily expanded over time as more and more special interests have come to comprehend that competition for federal largesse often proves far more lucrative than traditional competition in the free market.[9] The end result is a system that frustrates the goals of conservatives and progressives alike: conservatives cannot roll back existing government interventions, and progressives cannot muster the resources or political support to effectuate new interventions in an already over-burdened system.[10]

Seeking to alter this dynamic, academics and politicians have put forward a number of proposals for maintaining an appropriate role for federal power while controlling its excesses and unnecessary incursions into the free market. F.A. Hayek and other scholars of a libertarian bent have proposed greatly curtailing the power of the central state, confining its jurisdiction to a handful of critical roles and explicitly delimiting its functions.[11] Certain academics who envision a more active federal government have taken a less minimalist approach, contending that the decisionmaking power should, to the greatest extent possible, be consolidated in a centralized body—typically the President or a government agency acting on his or her behalf, such as the Office of Information and Regulatory Affairs (OIRA)—that can weigh the overall costs and benefits of governmental interventions and reach rational conclusions based upon available evidence.[12] Still others have argued

7. *See* Arthur S. Miller, *Pretense and Our Two Constitutions*, 54 GEO. WASH. L. REV. 375, 382 (1986).

8. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 127–29 (1971).

9. JONATHAN RAUCH, GOVERNMENT'S END 70–73 (1999).

10. *Id.* at 134–37, 148–50.

11. *See, e.g.*, F.A. HAYEK, THE ROAD TO SERFDOM 112 (Bruce Caldwell ed., 2007) (describing the legitimate role of government as "fixing rules determining the conditions under which the available resources may be used, leaving to the individuals the decision for what ends they are to be used"); LUDWIG VON MISES, LIBERALISM 37 (3d ed. 1985) ("This is the function that the liberal doctrine assigns to the state: the protection of property, liberty, and peace.").

12. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2340 (2001); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1367–73 (2013); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1849–50 (2013). That is, of course, by no means the consensus view of left-of-center academics, many of whom have strongly criticized the use of cost-benefit analysis to water down strong regulations emerging

against these centralizing tendencies, attempting to reassert a more active role for the people's representatives in Congress and curtail the powers of the unelected bureaucrats who operate the administrative state.[13]

As this debate has raged, one alternative few scholars or politicians have explored in any detail is drawing upon the experience of foreign governments for comparative insights that may inform any restructuring of the U.S. system.[14] In one sense, this oversight is not surprising. The other major developed nations of the world, including those of the European Union and East Asia, seem to suffer the same flaws of regulatory capture to a greater degree than the United States. Many have attributed the "lost decades" of anemic Japanese economic growth to an inappropriately close relationship between the government and major corporations,[15] and the "Third Way" policies of modern Europe have arguably devolved into a similar system of "crony capitalism" whereby large companies and, to a lesser extent, civil society groups such as unions drive government policy.[16] In this light, looking across the Atlantic or Pacific for guidance on promoting an optimal balance between statism and laissez-faire capitalism may strike many as fundamentally misguided, akin to soliciting Soviet insights on bureaucratic design in the waning days of the Gorbachev Administration.

Nonetheless, the inability of European and Asian governments to curtail their own growth does not detract from their comparative strengths or

from regulatory agencies. *See generally, e.g.*, Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002); Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433 (2008).

13. In the last two sessions of Congress, Senators and Congresspersons—most of them Republicans, with a notable few exceptions—have introduced a bevy of reform bills designed to rein in the administrative state and reassert Congress's primary role in designing regulatory policy. *See, e.g.*, Regulatory Improvement Act of 2014, H.R. 4646, 113th Cong. (2014); Regulatory Improvement Act of 2013, S. 1390, 113th Cong. (2013); Cost-Benefit and Regulatory Transparency Enhancement Act of 2013, H.R. 2593, 113th Cong. (2013); Sunset Act of 2012, H.R. 6333, 112th Cong. (2012); Regulatory Accountability and Economic Freedom Act of 2012, H.R. 4116, 112th Cong. (2012); Regulations from the Executive in Need of Scrutiny Act of 2011, H.R. 10, 112th Cong. (2011).

14. *But cf.* Lloyd N. Cutler, *To Form a Government*, 59 FOREIGN AFF. 126, 132 (1980) (advocating a parliamentary style government in the United States); Francis Fukuyama, *America in Decay: The Sources of Political Dysfunction*, 93 FOREIGN AFF. 5 (2014) (suggesting that the British parliamentary system may prove a viable alternative to the prevailing U.S. policymaking regime, which has become excessively constrained by checks and balances).

15. *See* RAUCH, *supra* note 9, at 16; Brink Lindsey & Aaron Lukas, *Revisiting the "Revisionists": The Rise and Fall of the Japanese Economic Model*, CATO INST. (July 31, 1998), http://www.cato.org/publications/trade-policy-analysis/revisiting-revisionists-rise-fall-japanese-economic-model.

16. GREGG, *supra* note 2, at 239–42.

preclude them from providing insights to U.S. reformers. Moreover, the present is an especially opportune moment for considering such insights, as the United States is simultaneously negotiating free trade agreements with both the European Union (the Transatlantic Trade and Investment Partnership)[17] and various Pacific Rim economies including Japan (the Transpacific Partnership).[18] Both agreements include regulatory coherence chapters designed to minimize unnecessary divergences between U.S. and foreign regulations,[19] providing an ideal opportunity to catalogue the strengths and weaknesses of each regulatory system and to implement rationalizing reforms on all sides.

This Article identifies certain comparative strengths of the EU policymaking regime and develops certain EU-inspired reforms that might enhance regulatory decisionmaking in the United States while still preserving the comparative advantages of the traditional U.S. approach. In Part I, this Article explores certain flaws in the existing U.S. regulatory regime. It focuses specifically on regulations designed to correct so-called "market failures"—i.e., instances in which an unregulated market cannot produce efficient outcomes and requires governmental intervention to maximize net social utility.[20] It contends that the existing policymaking framework does not contain sufficient safeguards to ensure that agencies devise efficient, narrowly tailored regulatory solutions to purported market flaws. Part II then highlights certain comparative strengths of the EU system for regulatory market interventions, while acknowledging its numerous weaknesses.

Part III seeks to translate the European innovations into the U.S. context, both reworking them to account for the fundamental disparities in European and U.S. policymaking, including the fact that the Executive Branch initiates lawmaking in the European Union, and attempting to correct for various flaws in the EU approach. Specifically, this Article proposes a new "track" for agency rulemaking, dubbed "market corrective rulemaking" (MCR), which would feature a set of default procedural requirements inspired by European practices, including early stakeholder

17. *See* Barack H. Obama, President of the United States, 2013 State of the Union Address (Feb. 12, 2013); *see also* Adam C. Schlosser & Reeve T. Bull, *Regulatory Cooperation in the TTIP*, REGBLOG (Aug. 27, 2013), http://www.regblog.org/2013/08/27-schlosser-reeve-ttip.html.

18. *See The Trans-Pacific Partnership*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (USTR), https://ustr.gov/tpp/ (last visited Sept. 20, 2015).

19. *See Trans-Pacific Partnership (TPP) Trade Ministers' Report to Leaders*, USTR (Nov. 12, 2011), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers'-re; Schlosser & Bull, *supra* note 17.

20. Tyler Cowen, *Public Goods and Externalities: Old and New Perspectives*, *in* PUBLIC GOODS AND MARKET FAILURES 1, 1 (Tyler Cowen ed., 1999).

input, comprehensive application of cost-benefit analysis, use of the proportionality principle, and mandated retrospective review. Congress would enjoy complete discretion in determining whether to invoke market corrective rulemaking, and traditional informal rulemaking procedures would always serve as the default. Finally, Part IV anticipates certain objections to the proposal and offers concise responses.

Ideally, erecting a new set of regulatory procedures designed to optimize and narrowly tailor regulatory interventions would serve to dispel much of the gridlock that surrounds any proposed governmental market intervention. At present, conservatives have tended to oppose any new regulation, however desirable or appropriate,[21] expressing the justifiable fear that even a seemingly benign intervention can evolve into an excessively burdensome and largely irrevocable constraint on the free market. Progressives, in turn, have tended to overlook or even defend glaring inefficiencies in the regulatory state for fear that any concession concerning the imperfections of government bureaucracies will validate the conservative narrative.[22] In light of this dynamic, it is perhaps ironic that promising reforms should be inspired by the European Union, given conservatives' utter disdain for a continent they regard as an effete bastion of "sclerotic socialism"[23] and progressives' eagerness to deny that Europe's present economic malaise carries any implications for the sustainability of the U.S. regulatory state.[24] Nevertheless, notwithstanding its inherent flaws and practical failings, the EU regulatory state represents a sophisticated system for responding to the various challenges associated with supervising a modern economy, and this Article endeavors to draw upon its strengths in designing a more responsive, efficient mechanism for correcting market

21. *See* Edward Wyatt, *Dodd-Frank Act a Favorite Target for Republicans Laying Blame*, N.Y. TIMES (Sept. 20, 2011), http://www.nytimes.com/2011/09/21/business/dodd-frank-act-is-a-target-on-gop-campaign-trail.html?pagewanted=all; *see also* Steven Mufson, *House to Vote on Cap-and-Trade Emissions Bill*, WASH. POST (June 24, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/06/23/AR2009062303456.html.

22. *See, e.g.*, Jim Puzzanghera, *Top Democratic Lawmakers Stand by Obama on Healthcare Rollout*, L.A. TIMES (Nov. 17, 2013), http://articles.latimes.com/2013/nov/17/news/la-obamacare-top-democrats-obama-healthcare-website-rollout-20131117.

23. *See, e.g.*, Henry Blodget, *Maybe Europe's "Sclerotic Socialism" Isn't Such A Bad Economic Model After All*, BUS. INSIDER (Aug. 14, 2009, 10:44 AM), http://www.businessinsider.com/henry-blodget-maybe-europes-sclerotic-socialism-isnt-such-a-bad-economic-model-after-all-2009-8; Sebastian Fischer, *Socialism and Welfare: Republicans Bash Europe in Search for Votes*, SPIEGEL ONLINE (Jan. 9, 2012), http://www.spiegel.de/international/world/socialism-and-welfare-republicans-bash-europe-in-search-of-votes-a-808044.html; Nicholas Kristof, *Why is Europe a Dirty Word?*, N.Y. TIMES (Jan. 14, 2012), http://www.nytimes.com/2012/01/15/opinion/sunday/kristof-why-is-europe-a-dirty-word.html.

24. *See* Paul Krugman, *Legends of the Fail*, N.Y. TIMES (Nov. 10, 2011), http://www.nytimes.com/2011/11/11/opinion/legends-of-the-fail.html.

failures.

I. RATIONALIZING REGULATORY POLICYMAKING

Though the Constitutional Framers set out to create a limited federal government, explicitly defining the powers of the national Congress[25] and reserving all residual powers to the states or to the sovereign people,[26] Congress's authority to act within its enumerated powers is virtually unbounded, save for various protections of civil liberties contained elsewhere in the Constitution.[27] In this light, federal courts will not second-guess either Congress's motives in promulgating a statute or the means it has chosen to achieve its desired end, absent some violation of a provision of the Constitution or an overly expansive reading of Congress's Article I powers. Thus, Congress passes legislation designed to correct a number of perceived ills, including, inter alia, criminal conduct, invidious discrimination,[28] infringement of religious liberty,[29] conduct deemed immoral,[30] and self-destructive behavior.[31]

In many instances, Congress acts to correct what it perceives as a flaw in the market forces prevailing in a system of laissez faire capitalism, attempting to realign market incentives in a manner that it believes will maximize net social utility.[32] Traditionally, Congress has legislated in response to a number of market dynamics described in the economic literature as "market failures," including:

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25. U.S. CONST. art. I, § 8.

26. U.S. CONST. amends. IX–X.

27. Buckley v. Valeo, 424 U.S. 1, 132 (1976) (citations omitted) ("Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction."); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 279 (2002) (noting that Congress possesses extensive legislative power under the Commerce Clause but cannot wield that authority in a manner that violates certain negative rights contained in the Constitution).

28. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 2000a–2000h-6 (2012)).

29. *See, e.g.*, Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106–274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to -5); Religious Freedom Restoration Act, Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb to -4).

30. *See, e.g.*, Mann Act, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–24).

31. *See, e.g.*, Controlled Substances Act, Pub. L. No. 91–513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. § 801–971).

32. *See* STIGLITZ, *supra* note 3, at 33–34 ("Markets by themselves often fail to produce efficient and desirable outcomes, and there is a role for government in correcting these market failures, that is, designing policies (taxes and regulations) that bring private incentives and social returns into alignment.").

- *Monopoly Power*: The economies associated with the expanding scale of firms may result in a situation in which one or a few major firms dominate a given segment of the economy, creating the risk that these firms will increase prices beyond the levels justified by the laws of supply and demand.[33]
- *Externalities*: Prevailing market forces may not require existing firms to internalize all the costs of their activities, creating an incentive for those firms to continue engaging in such activities, even if they impose net costs on society.[34]
- *Public Goods*: Situations may emerge wherein the benefits individual actors accrue from exploiting a certain economic good exceed the costs, even if the net social costs of such exploitation exceed the benefits.[35]
- *Information Asymmetries*: Though classical economic theories assume that all individuals have access to perfect information,[36] this assumption often does not hold in practice. In some situations, one set of actors may consistently possess more or superior information vis-à-vis another set of actors.[37]

Notwithstanding the nearly uniform consensus of economists on the existence of such market dynamics, the question of how to ascertain the existence of a "market failure" and the related inquiry of whether intervention by some external actor can restore market efficiency are subjects of vigorous academic debate.[38] Furthermore, even assuming that astute government interventions can correct market failures and maximize net social utility, a number of vexing problems complicate any effort to design targeted market corrections. For instance, consider the example of emissions of industrial pollutants by factories adjacent to a national forest, resulting in habitat loss for an endangered species (a classic externality problem). In contemplating a statute designed to correct this market failure, the legislature must consider the following issues:

- The legislature must first ascertain the existence of a "market

33. SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 13 (2d ed. 2012).
34. *Id.* at 12.
35. *Id.* at 13.
36. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 6–7 (2009).
37. DUDLEY & BRITO, *supra* note 33, at 13–14.
38. *Compare* DAVID D. FRIEDMAN, THE MACHINERY OF FREEDOM 261 (3d ed. 2014) ("In the real world, the alternative to laissez-faire is not rule by a benevolent and supremely competent dictator, it is having decisions made on the political market instead of the private market . . . . Market failure, the exception on the private market, is the rule on the political market."), *with* STIGLITZ, *supra* note 3, at 21 ("There is in fact little presumption that markets are in general efficient. This means that there is an enormous potential role for government to correct these market failures.").

failure." The simplest means of doing so would presumably compare the economic costs and benefits of the status quo to the economic costs and benefits of a number of alternative regulatory interventions and determine whether one of the regulatory alternatives maximizes net social benefits. This requires exceedingly difficult economic modeling, including both the construction of counter-factual scenarios (i.e., forecasting the costs and benefits of a hypothetical state of affairs)[39] and efforts to quantify somewhat abstract benefits (e.g., what is the monetary value of preserving the endangered species?).[40]

- Once the legislature has decided that a "market failure" exists, it must then determine the nature and scope of the optimal regulatory intervention. This may simply entail selecting the intervention that maximizes net economic benefits, though other policy goals may counsel in favor of selecting another alternative. For instance, in the hypothetical scenario, mandating that factories adopt a technology that eliminates all noxious emissions might maximize net benefits if the projected benefits of preserving the endangered species are large and the projected compliance costs to industry are comparatively small. Nevertheless, if the legislature anticipates that this approach may prove unnecessarily disruptive to industry—e.g., if the factories have relatively low profit margins—it may select a less burdensome alternative, such as a system of tradable permits allowing holders to emit a certain quantity of pollutant.[41]

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39. *See* Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of* Winstar*: An Interim Report*, 51 ALA. L. REV. 1177, 1224–25 (2000) ("There may be no direct evidence of how a comparable institution would have fared under the counter-factual course of regulatory treatment through the same stretch of time. The truth seems to be that it is extremely difficult to establish with any confidence what the economic fortunes of a particular enterprise would have been had it been afforded a radically different regulatory environment.").

40. *See* Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993) (noting that some "qualitative measures of costs and benefits" are "difficult to quantify, but nevertheless essential to consider").

41. *See* Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 582 (1979) (contending that regulators might correct for externalities by issuing "a limited number of rights to engage in [disfavored] conduct (such as pollution)," which then can be "bought and sold on the free market"). Applying these principles, several Senators and Congresspersons have introduced "cap-and-trade" legislation in the last several congressional sessions to deal with the threat of anthropogenic climate change, though none of these bills has yet passed. *See, e.g.*, Ensuring Affordable Energy Act, H.R. 621, 113th Cong. (2013); Ensuring Affordable Energy Act, H.R. 153, 112th Cong. (2011); Ensuring Affordable Energy Act, H.R. 6511, 111th Cong. (2010); Emission Migration Prevention with Long-term Output Yields Act, H.R. 1759, 111th Cong.

- Even if the legislature correctly diagnoses a "market failure," market forces may evolve such that outside intervention becomes unnecessary. For instance, the factories described in the hypothetical may eventually adopt novel production methods that no longer emit the pollutant in question. If the legislature has mandated the adoption of a pollution-abatement filter on all emitting sources, the statute may impose an unjustified burden on factories wishing to install new machinery without the required filters. The legislature can theoretically repeal the statute, but it may fail to do so for reasons of inertia or lobbying by interests that benefit from the status quo.[42]

Lamentably, Congress is not well positioned to conduct these analyses and devise the optimal regulatory intervention in response to a perceived market failure. Though congressional committees are staffed by policymaking experts,[43] and though Senators and Congresspersons can call upon the services of the Congressional Budget Office (CBO) to ascertain the budgetary impact of proposed legislation,[44] Congress as a whole generally lacks the institutional expertise to assess market failures, design narrowly tailored legislative responses, and then readjust the legislation in response to evolving market forces.

Fortunately, Congress need not rely exclusively upon its own expertise in conducting this exercise. For well over a century, Congress has delegated exceedingly expansive regulatory powers to administrative agencies,[45]

(2009); Global Warming Reduction Act of 2007, S. 485, 110th Cong. (2007); Electric Utility Cap and Trade Act of 2007, S. 317, 110th Cong. (2007).

42. *See* Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 346–47 (2007). For instance, in the hypothetical scenario, factories that have installed the pollution-abatement technology may argue in favor of preserving the statute, since they have already incurred the sunk costs associated with installing the technology and may benefit from the barrier to entry that the legislation imposes on new firms.

43. David M. Wagner, American Trucking*: The "New Nondelegation Doctrine" is Dead (Long Live the Old One?)*, 11 U. BALT. J. ENVTL. L. 25, 27 (2003) ("Congress . . . employs experts, especially on its committee staffs as distinct from its personal staffs, and these experts play a major role in drafting legislation.").

44. CONGRESSIONAL BUDGET OFFICE (CBO), AN INTRODUCTION TO THE CONGRESSIONAL BUDGET OFFICE 2 (Nov. 2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/2012-IntroToCBO.pdf ("CBO provides formal, written estimates of the cost of virtually every bill 'reported' (approved) by Congressional committees to show how the bill would affect spending or revenues over the next 5 or 10 years, depending on the type of spending involved.").

45. The first modern agency, the Interstate Commerce Commission, was formed in 1887. Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, "Agency Capture," and Airline Security*, 10 AM. U. J. GENDER SOC. POL'Y & L. 381, 387 (2002). As Professor Jerry Mashaw has demonstrated, however, the various Cabinet

which are staffed by economists, scientists, and other technical specialists who are much better equipped to grapple with these challenging problems. In light of the decline of the non-delegation doctrine, Congress can, in theory, merely limn the broad outlines of a market flaw calling for regulatory intervention and rely upon administrative agencies to engineer an appropriate solution.[46]

Unlike Congress, agencies are, as a general matter, legally bound to consider the economic costs and benefits of their proposed regulatory actions. Under Executive Order (EO) 12,866, executive branch agencies must take into account costs and benefits associated with proposed rulemakings, unless they are foreclosed from doing so by law, and they must prepare a formal regulatory impact analysis for "significant regulatory actions"—i.e., those exceeding $100 million in annual economic impact—that is reviewed by OIRA.[47] Independent regulatory agencies are not subject to the regulatory analysis requirements in EO 12,866, but they are often required to consider costs and benefits via their authorizing statutes.[48] Thus, to the extent that an agency endeavors to craft a regulatory response to a market failure, it likely will give some consideration to the economic impacts of its proposed intervention.

At the same time, significant interstices in agency economic analysis requirements remain. Though most independent regulatory agencies are statutorily required to consider regulatory benefits and costs or voluntarily

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Departments assumed significant executive responsibilities from the very early days of the Republic, suggesting that the modern conception of "administrative law" developed much earlier than originally supposed. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 33 (2012).

46. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 378 (1989) (rejecting the proposition that delegations "may not carry with them the need to exercise judgment on matters of policy"). The Supreme Court drew similar conclusions in *Yakus v. United States*:

> The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.

331 U.S. 414, 424–25 (1944).

47. *See* Exec. Order No. 12,866 §§ 3(f), 6, 58 Fed. Reg. 51,735, 51,740–42 (Oct. 4, 1993); *see also* Exec. Order No. 13,563 § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (reaffirming the principles of Executive Order 12,866).

48. *See* CURTIS W. COPELAND, ECONOMIC ANALYSIS AND INDEPENDENT REGULATORY AGENCIES 38–55 (Apr. 30, 2013), *available at* https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf (cataloguing statutory cost-benefit analysis requirements at various independent regulatory agencies).

elect to do so,[49] they generally are under no obligation to quantify benefits and costs and attempt to maximize net monetary benefits.[50] Moreover, in some instances, both executive branch and independent regulatory agencies are foreclosed from relying upon projected economic costs and benefits in devising a regulation.[51] Finally, even for those executive branch agency rules for which EO 12,866 requires consideration of costs and benefits, OIRA only reviews those rules that qualify as "significant,"[52] thereby removing a powerful incentive for agencies to conduct rigorous economic analysis and to coordinate their regulatory decisionmaking with sister agencies for those rules that do not meet that threshold.[53]

In addition, mere maximization of net economic benefits may not necessarily represent the optimal strategy for addressing many market failures. As implied in the hypothetical market intervention designed to mitigate externalities, a benefit-maximization strategy may prove unnecessarily disruptive of the underlying market, such that a more modest alternative with smaller net benefits is preferable.[54] For example, pure cost-benefit analysis may not account for distributional impacts: if the benefit-maximizing strategy creates significant benefits for relatively affluent entities (e.g., large incumbent firms) and imposes major costs on relatively impecunious ones (e.g., small startup businesses), an alternative approach may prove preferable.[55]

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49. *Id.*

50. *Id.* at 4.

51. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 466–67 (2001) (determining that the provisions of the Clean Air Act authorizing the Environmental Protection Agency (EPA) to set national ambient air quality standards foreclose the consideration of regulatory costs); Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993) (urging executive branch agencies to maximize net regulatory benefits "unless a statute requires another regulatory approach"). *But see* Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 177 (1997) ("Statutes that explicitly forbid consideration of costs are extremely rare.").

52. Exec. Order No. 12,866 §§ 3(f), 6(b)(1), 58 Fed. Reg. 51,735, 51,738, 51,742 (Oct. 4, 1993).

53. *See* Sunstein, *supra* note 12, at 1840 (emphasizing the Office of Information and Regulatory Affairs' (OIRA's) coordinative role).

54. This is especially problematic if there is reason to believe that the agency's calculations improperly inflate regulatory benefits. *See* Gabriel Daly, *A New Cost of Cost-Benefit Analysis?*, HARV. ENVTL. L. REV. BLOG (Nov. 7, 2013), http://www3.law.harvard.edu/journals/elr/2013/11/07/a-new-cost-of-cost-benefit-analysis/#_ftn5 (describing the controversy surrounding the EPA's reliance upon "co-benefits" from reduction in ambient particulate matter to justify a regulation aimed at reducing mercury emissions).

55. *See* Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993) (directing executive branch agencies to consider "distributive impacts," amongst other factors, in addition to a pure calculation of economic costs and benefits); Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1407 (2003) ("Aggregate statistics conceal potentially important issues of who pays the cost of regulation, and who benefits."); *see also*

To some extent, broad public participation may correct for the lack of any comprehensive regime for weighing regulatory costs and benefits: under pluralistic conceptions of government, special interests will lobby government decisionmakers, and the decisionmakers will favor those groups that advocate most effectively, and therefore placing the highest value upon the outcome sought.[56] Though, in theory, it is easier for an individual stakeholder to influence an administrative agency engaged in notice-and-comment rulemaking than it is to influence Congress,[57] in reality, the vast majority of influential public comments received by agencies are submitted by large firms rather than small businesses, civil society organizations, or members of the general public.[58] Furthermore, agencies often receive informal stakeholder input well in advance of initiating notice-and-comment,[59] and less sophisticated stakeholders may not be aware of or favorably positioned to participate in this process. This potential for skewed input places a major limitation on agencies' ability to effectively resolve market failures, increasing the likelihood that governmental

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Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 9–12 (1998) (noting how environmental laws designed to maximize net environmental benefits may have inflicted disproportionate harms on poor and minority communities).

56. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 48–50 (4th ed. 2007) ("Our pluralistic system is a marketplace of ideas, where all perspectives are articulated forcefully and persuasively. The best ideas succeed, while the worst are discarded.").

57. Agencies, unlike members of Congress, are required to engage in a formal process by which they solicit stakeholder input. Though any person—human or corporate—can lobby members of Congress, Senators and Congresspersons are under no formal obligation to consider outside input—other than the electoral consequences that may result from ignoring the concerns of their actual constituents—and the cost of compiling information that is likely to prove influential in statutory policymaking is relatively high. *See* Albert R. Hunt, *Unleashing More Money into Politics*, N.Y. TIMES (Aug. 25, 2013), http://www.nytimes.com/2013/08/26/us/unleashing-more-money-into-politics.html (noting that small contributions to candidates are not as influential when donors can spend millions). By contrast, the Administrative Procedure Act (APA) mandates that agencies provide notice and an opportunity for comment in connection with most rulemakings and consider the "relevant matter presented" in the materials received. 5 U.S.C. § 553 (2012).

58. *See, e.g.*, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 431 (2007); Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 235–36 (2012); Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1772, 1785–86 (2012); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006).

59. ESA L. SFERRA-BONISTALLI, ACUS, EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING 15 (May 1, 2014), *available at* https://www.acus.gov/sites/default/files/documents/Final%20Ex%20Parte%20Communications%20in%20Informal%20Rulemaking%20%5B5-1-14%5D_0.pdf.

interference will improperly favor a handful of well-connected players.[60]

Finally, even assuming that an agency correctly diagnoses a market failure and crafts a well-tailored response, market dynamics may evolve such that an optimal approach becomes increasingly suboptimal over time. Partly in response to this problem, President Obama recently issued three executive orders on "retrospective review" of agency regulations. Two such orders direct all executive branch agencies to review their existing stock of regulations periodically and eliminate or modify those rules that have become outdated[61]; a third encourages independent regulatory agencies to do the same, though they are under no legal obligation to comply.[62]

In theory, to the extent that market dynamics have shifted such that an agency's response to a preexisting market failure has become outdated, the agency will identify this flaw while conducting retrospective review and revise its rule accordingly. In practice, this outcome is unlikely. First, a system of self-review by agencies suffers from a number of flaws: agency officials may be strongly invested in the regulatory status quo; they may lack the resources to conduct robust retrospective analysis; and they may be unaware of how their rules interact with those of sister agencies.[63] Second, even assuming that the agency conducts a thorough lookback analysis and identifies outmoded regulations, it may lack the statutory authority to abandon these regulatory interventions or modify them in a manner that responds to evolving market forces.

In short, though administrative agencies are almost certainly more capable of crafting sophisticated, narrowly tailored regulatory responses to perceived market failures than Congress, the regulatory policymaking process nevertheless suffers from a number of drawbacks that virtually ensure that many, if not most, efforts to correct market flaws will be suboptimal in the initial instance and will become increasingly outmoded—and, not infrequently, counterproductive—over time. Though this is, to some extent, inevitable in a system that relies upon government officials to diagnose market flaws based on imperfect information and then attempt to craft long-term solutions,[64] one might nevertheless design a more dynamic

60. *See* RANDALL G. HOLCOMBE & ANDREA M. CASTILLO, LIBERALISM AND CRONYISM 3–4 (2013) (contending that any political system that places decisionmaking power in a governmental official, rather than the free market, necessarily requires some level of discretion in allocating costs and benefits of government activity and therefore creates the risk of cronyism).

61. Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012); Exec. Order No. 13,563 § 6, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

62. Exec. Order No. 13,579 § 2, 76 Fed. Reg. 41,587, 41,587 (July 14, 2011).

63. Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 265 (2015).

64. *See* FRIEDMAN, *supra* note 38, at 261 ("Individual actors usually receive most of the

regulatory system that relies upon the best available information in engineering responses to market failures and then readjusts the regulatory response in light of evolving market forces. Taking a worldwide perspective, no modern state has designed an optimal solution, yet the European Union has developed a number of innovations for confronting this problem. The next Part analyzes some of the comparative strengths of the EU system and examines whether they might elucidate promising reforms for the U.S. regime.

II. DRAWING UPON EU INSIGHTS

In many important respects, the EU regulatory system is fully decades behind its American counterpart. Whereas the Administrative Procedure Act (APA) was enacted in 1946,[65] and the modern system of Presidential review of agency rulemaking took form over the 1970s and was formalized in 1981,[66] the current EU regulatory framework was substantially reworked in the Treaty of Lisbon in 2009 and continues to evolve.[67] Administrative law scholars have hailed the U.S. notice-and-comment rulemaking process as a profound innovation that has proven remarkably durable over its roughly seventy-year history.[68] The European Union, by contrast, recently overhauled the comitology process by which it adopts "secondary legislation" in the Lisbon Treaty.[69]

Notwithstanding its flaws, the EU lawmaking process has numerous features that contrast favorably with the American approach. Indeed, the architects of the EU system had the benefit of observing the longstanding

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benefit and pay most of the cost of their actions, making market failure the exception, not the rule. On the political market individual actors—voters, politicians, lobbyists, judges, policemen—almost never bear much of the cost of their actions or receive much of the benefit. Hence market failure, the exception on the private market, is the rule on the political market."); HAYEK, *supra* note 11, at 95 ("There would be no difficulty about efficient control or planning were conditions so simple that a single person or board could effectively survey all the relevant facts. It is only as the factors which have to be taken into account become so numerous that it is impossible to gain a synoptic view of them that decentralization becomes imperative.").

65. Pub. L. No. 79–404, 60 Stat. 237 (1946).

66. Jim Tozzi, *OIRA's Formative Year's: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 44–45, 63 (2011).

67. *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 290–91, Oct. 26, 2012, 2012 O.J. (C 326) 172–73 [hereinafter TFEU] (revamping the EU comitology process by creating a new system wherein regulatory actions are categorized as "implementing acts" or "delegated acts").

68. *See* William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 237 (1986) (referring to the notice-and-comment provision of the APA as a "striking example of durability" that "reads today just as it did when it was enacted in 1946").

69. TFEU, *supra* note 67, arts. 290–91, at 172–73.

U.S. regime and designing their system to correct for its perceived limitations.[70] While eschewing any normative judgment as to which system is superior on the whole—which is likely to be a fruitless exercise and to depend upon the policies one deems paramount—one can nonetheless identify strengths of the EU system that render it more rational and efficient in certain respects. This Part will highlight four of those comparative advantages: (1) early solicitation of stakeholder input; (2) early application of cost-benefit analysis; (3) use of the proportionality principle; and (4) retrospective review of all laws. This Part will also examine certain flaws of the EU system, including EU regulators' frequent failure to live up to the overall aspirations of the regime, thus identifying minefields U.S. regulators should avoid in enacting any European-inspired reforms.

(1) *Early, Diverse Stakeholder Input*: At the rulemaking stage, the U.S. regulatory system is premised on the notion that decisionmakers should have access to the widest possible array of information. Much of the data upon which agency decisionmakers rely is developed "in-house" by technically trained officials, but the notice-and-comment process ensures that private sector entities enjoy the opportunity to furnish any information they deem relevant to the agency for its consideration.[71] Agency officials must consider any "relevant matter presented" in such comments,[72] and they risk having their determinations set aside as "arbitrary and capricious" on judicial review if they fail to do so.[73] The model essentially represents a partial application of the "wisdom of crowds" phenomenon[74]: though private entities do not actually render the ultimate determination, they offer input that agency experts then sort to glean relevant information.[75]

This pluralistic model works well if all relevant interests have an equal opportunity to furnish information to the agency, but empirical work

70. In this sense, the dynamic resembles constitutional drafting in newly emerging nations, which often borrows heavily not only from the U.S. Constitution itself but also from the subsequent centuries of constitutional interpretation and elaboration by the courts. Anthony Lester QC, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 537 (1988).

71. 5 U.S.C. § 553 (2012).

72. *Id.* § 553(c).

73. *Id.* § 706(2)(A).

74. JAMES SUROWIECKI, THE WISDOM OF CROWDS xiii (2005) ("Under the right circumstances, groups are remarkably intelligent, and are often smarter than the smartest people in them.").

75. Reeve T. Bull, *Public Participation and the Transatlantic Trade and Investment Partnership*, __ GEO. WASH. L. REV. __ (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638010## ("Widespread participation ensures that the government regulators have the broadest possible information base, and experts can sift through that information to identify considerations relevant to a proposed regulation.").

examining the rulemaking comment process suggests that this assumption often does not hold. Entities that are likely to experience either concentrated benefits or harms as a result of regulatory policymaking have a much stronger incentive to participate in the process vis-à-vis less directly-affected parties, which often includes the general public,[76] and large corporations often flood agencies with detailed comments that the agency may find difficult to ignore, especially given the legal obligation to consider any "relevant matter presented" therein.[77]

The European system offers a compelling contrast. In addition to soliciting outside input much earlier in the policymaking process—essentially at the equivalent of the legislative stage in the United States—the European Commission (Commission) undertakes affirmative efforts to include a diverse set of stakeholders when gathering information.[78] Though the Commission tends to turn to a small coterie of repeat players, often including large European companies and labor unions,[79] the public input process is nevertheless notable for its effort to ensure a nominally balanced representation of stakeholder interests.[80]

The EU process is not a model in all respects. First, the Commission enjoys virtually unbounded discretion in determining when it will seek public input, and many regulations and directives (the rough equivalent of U.S. statutes),[81] as well as implementing and delegated acts (the EU

76. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 56–61 (2012).

77. 5 U.S.C. § 553(c) (2012); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1329 (2010) (referring to the phenomenon of "information capture," described as "a basic failure of the administrative process to force participants to ensure that the information they provide meets the needs of the audience and situation.").

78. COMMISSION OF THE EUROPEAN COMMUNITIES, COM (2002) 704 FINAL, TOWARDS A REINFORCED CULTURE OF CONSULTATION AND DIALOGUE 3 (Dec. 11, 2002) [hereinafter EUROPEAN COMMUNITIES], http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0704&from=EN (explaining that the Commission of the European Communities "incorporates external consultation into the development of almost all its policy areas").

79. *See* Shawn Donnan, *U.S. Pushes for Greater Transparency in EU Business Regulation*, FIN. TIMES (Feb. 23, 2014, 12:03 PM), http://www.ft.com/intl/cms/s/0/6e9b7190-9a65-11e3-8e06-00144feab7de.html#axzz38mJgpnx2 ("U.S. companies also complain that they are often shut out of the regulatory process in Europe because the EU system can depend on closed consultations with local industry groups that make it difficult for outsiders to register their concerns.").

80. In this sense, the EU process resembles the use of advisory committees in the United States. The Federal Advisory Committee Act (FACA) explicitly requires that the membership of such committees include a balanced representation of key interests and relevant viewpoints. Pub. L. 92-463 (codified as amended in 5 U.S.C. app.).

81. An EU regulation, like a U.S. statute, establishes a policy that applies directly to EU citizens. Directives, by contrast, set forth a policy goal but authorize member states to erect

counterpart of U.S. regulations,[82] do not undergo the public input process described above.[83] Second, stakeholders generally do not enjoy the opportunity to comment on the proposed text of a regulation or directive; though the opportunity to offer input at the green paper stage is valuable, it can be challenging for stakeholders to anticipate precisely how a proposed policy will affect them absent specific operative text on which they might comment.[84] Finally, even when stakeholders receive the opportunity to comment, they typically lack standing to challenge the final law that emerges, and the Commission's sense of obligation to respond to salient comments is accordingly reduced.[85] Indeed, the European Union could draw numerous lessons from the U.S. system, and the creation of a European version of notice-and-comment is one of the matters under consideration in the regulatory coherence chapter of the Transatlantic Trade and Investment Partnership.[86]

Nevertheless, if the United States places a high value upon public input, as it purports to do in connection with the rulemaking process, it would be well served to consider innovations that promote early and diverse stakeholder involvement. The European Commission's experiences in this arena are relevant to any such reform efforts.

(2) *Comprehensive Cost-Benefit Analysis*: Of the various innovations in regulatory decisionmaking in the last several decades, perhaps none has proven more controversial than the increased use of cost-benefit analysis in

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laws to achieve this objective. PETER STRAUSS ET AL., ADMINISTRATIVE LAW OF THE EUROPEAN UNION: RULEMAKING 29 (George A. Bermann et al. eds., 2008).

82. Implementing acts task the European Commission with "filling in the details" of the associated regulations or directives. Delegated acts authorize the Commission to make certain substantive determinations (including making minor amendments to the associated regulation or directive), which are subject to override by the EU Council or Parliament. TFEU, *supra* note 67, arts. 290(1), 291(2), at 172–73.

83. *See* EUROPEAN COMMUNITIES, *supra* note 78, at 3 (emphasis added) (noting that the Commission "incorporates external consultation into the development of *almost all* its policy areas").

84. *See* Donnan, *supra* note 79 ("Both European and American business want to provide meaningful analysis for proposed EU legislation and regulation, but to do this we need to see and comment on the actual text being considered.").

85. *See* TFEU, *supra* note 67, art. 263, at 162 (limiting judicial review to acts that either are "addressed to" the challenging party or are "of direct and individual concern" to said party); *see also* STRAUSS, *supra* note 81, at 25–26.

86. Press Release, USTR, U.S. Objectives, U.S. Benefits in the Transatlantic Trade and Investment Partnership: A Detailed View (March 2014), *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View ("We will . . . seek opportunities for interested parties to learn about and provide meaningful input on measures before they are adopted and finalized.").

selecting amongst regulatory alternatives.[87] While regulatory advocates invoke soaring, transcendental language to espouse such universally appealing goods as environmental protection, workplace safety, a wholesome food supply, universal medical care, and a sound financial system, calling upon the "dismal science" to deflate these noble ambitions seems comparatively petty and even misanthropic.

Nonetheless, unless one somehow succeeds in repealing the laws of scarcity, even cursory reflection quickly reveals that some version of cost-benefit analysis is absolutely necessary in any regulatory determination. As then-Professor Stephen Breyer vividly demonstrated in *Breaking the Vicious Circle*, the costs incurred by agencies in saving "statistical lives" vary massively, with a range of roughly seven orders of magnitude between the least and most expensive programs.[88] Though affixing any value to human life or other higher order values may strike laymen as crass, the costs of overregulation consist not only of foregone earnings for large corporations but also of societal resources diverted from more productive uses, as economists have shown through their work on risk-risk tradeoffs.[89] Indeed, dedicating excessive regulatory resources to a given risk almost certainly leads to a net reduction in overall societal well being because at least part of the resources sacrificed could have been used to minimize risks in other areas.[90] In this light, some form of cost-benefit analysis is *sine qua non* to promote not only efficiency but also fairness, ensuring that regulators do

87. *See, e.g.*, RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC 93 (2010). *Cf.* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 10 (2008) ("Although cost-benefit analysis, as currently practiced, is indeed biased against regulation, those biases are not inherent to the methodology. If those biases were identified and eliminated, cost-benefit analysis would become a powerful tool for neutral policy analysis."). *See generally* Ackerman & Heinzerling, *supra* note 12; Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998).

88. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 24–27 (1993). *But see* Heinzerling, *supra* note 87, at 1983 n.2, 1995–96 (calling into question the range of regulatory costs cited by Professor Breyer and others).

89. *See* John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, *in* RISK VERSUS RISK 1, 1 (John D. Graham & Jonathan Baert Wiener eds., 1995) (discussing the problem of risk-risk tradeoffs).

90. Economists have shown that an increase in gross domestic product leads to an increase in the number of statistical lives saved per annum. *See, e.g.*, Randy Lutter & John F. Morrall III, *Health-Health Analysis: A New Way to Evaluate Health and Safety Regulation*, 8 J. RISK & UNCERTAINTY 43, 53–55 (1994); Randall Lutter et al., *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 ECON. INQUIRY 599 (1999); *see also* FRIEDMAN, *supra* note 38, at 88 ("Visibility is an important element in politics and the FDA is a political institution. Given a choice between one tragedy on the front page and ten in the medical statistics, it inevitably prefers the latter. It thus has a strong bias in favor of overregulating, of stifling medical progress in the name of caution.").

not improperly privilege one set of concerns at the expense of even more pressing matters.

In this light, the European Commission's approach of considering regulatory costs and benefits when adopting regulations and directives contrasts favorably with the American system, wherein any formal consideration of costs and benefits typically awaits the rulemaking stage, if it even occurs at all.[91] This is not, of course, to suggest that the European approach is superior in all respects. Indeed, the Commission deploys an "Integrated Impact Assessment" model that, while nominally more comprehensive than the U.S. approach insofar as it considers factors other than quantified benefits and costs, including the social and environmental impacts of proposed actions,[92] is arguably less disciplined insofar as it affords considerable discretion to regulators to determine precisely how to weigh the competing tradeoffs.[93]

This is also not to suggest that considerations of monetary costs and benefits should be dispositive in all cases. Notwithstanding advances in willingness to pay analysis and other economic metrics, significant challenges in measuring the often numinous, transcendental benefits of regulations remain.[94] For instance, one could presumably measure the value of preserving a national park from commercial development by aggregating the admission fees received, but most would likely agree that such a metric significantly undervalues the benefits the American citizenry derives from retaining certain wilderness reserves in a pristine state.[95] In addition, on the expense side of the equation, lawmakers' determination to ignore economic costs can occasionally have a technology-forcing effect, sparking innovation that may not otherwise have occurred.[96]

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91. *See* RICHARD PARKER & ALBERTO ALEMANNO, TOWARDS EFFECTIVE REGULATORY COOPERATION UNDER TTIP: A COMPARATIVE OVERVIEW OF THE EU AND U.S. LEGISLATIVE AND REGULATORY SYSTEMS 23–24 (May 13, 2014), *available at* http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152466.pdf ("While most countries apply [impact analyses] exclusively to acts of either a legislative nature (e.g., France) or those of non-legislative nature (e.g., the United States), the Commission's [impact analysis] system boasts a broader coverage, including both legislative and non-legislative regulatory proposals, while extending to other initiatives such as communications, expenditure programmes and negotiating guidelines for international agreements.").

92. *Id.* at 25–28.

93. Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European "Fashion" Export the United States Can Do Without*, 17 TEMP. POL. & CIV. RTS. L. REV. 491, 520 (2008).

94. *See* Robert H. Nelson, *Bringing Religion into Economic Policy Analysis*, REGULATION, Spring 2014, at 52–53 (arguing that it is difficult to justify modern environmentalism purely in economic terms and that agencies should be mindful of "religious" justifications for certain regulatory policies).

95. *Id.* at 53.

96. *See, e.g.*, Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657, 691–92 (2010) (internal quotation marks omitted) (describing "technology-

Thus, in certain circumstances, it is entirely appropriate for lawmakers to value qualitative benefits over quantitative costs or to approach projected cost estimates with some degree of skepticism. Nevertheless, lawmakers should at least be aware of the likely economic impacts of their proposed actions. It is one thing for a regulator to compare the abstract benefits of environmental protection to the best available evidence concerning the costs, which may underestimate the savings resulting from future technological advances, and conclude that the former outweigh the latter; it is quite another for the same regulator to pursue environmental preservation blithely unaware of the scope of the economic dislocations it may create. In short, furnishing more information will almost necessarily lead to more sophisticated decisionmaking,[97] and cost-benefit analysis provides information that is relevant to any proposed law that will affect the economy. Thus, Europe's more pervasive use of cost-benefit analysis is a model worth emulating.

(3) *The Proportionality Principle*: Protocol No. 2 of the Treaty on the Functioning of the European Union (Protocol) declares, "Each institution shall ensure constant respect for the principle[] of . . . proportionality."[98] Though the Protocol does not define the proportionality principle with any degree of precision, European courts have fleshed out the dimensions of the doctrine over time. The European Court of Justice held that compliance with the principle turns on "whether the means . . . employ[ed] are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it."[99] The principle is roughly

forcing regulations" as those "that oblige firms to develop new, more effective technologies"); Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 178–79 (1997) ("Regulations that confront industry with the prospect of substantial compliance costs create greater incentives for the development of cheaper control technology.").

97. Behavioral economists have shown that, in certain circumstances, additional information can actually lead to *poorer* decisionmaking insofar as an individual overwhelmed by information may substitute a simpler problem or simply refuse to decide. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 96–104 (2011) (describing the substitution phenomenon); BARRY SCHWARTZ, THE PARADOX OF CHOICE 2 (2004) ("As the number of available choices increases, as it has in our consumer culture, the autonomy, control, and liberation this variety brings are powerful and positive. But as the number of choices keeps growing, negative aspects of having a multitude of options begin to appear."). This does not, however, support the conclusion that minimizing the available information leads to more sophisticated decisionmaking. Though excessive information may be crippling, a basic understanding of the economic costs and benefits that a proposed legislative or regulatory action might produce is absolutely fundamental to rendering an intelligent decision.

98. Consolidated Version of the Treaty on the Functioning of the European Union Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality art. 1, Oct. 26, 2012, 2012 O.J. (C 326) 206.

99. Case C-84/94, United Kingdom v. Council, 1996 E.C.R. I-5755, I-5811.

analogous to the tailoring inquiry involved in due process and equal protection analysis under U.S. constitutional law.[100]

Erecting a proportionality requirement similar to that prevailing in the European Union would potentially prove highly disruptive to the work of U.S. regulators. Absent a constitutional issue, courts lack the institutional power to set aside duly enacted statutes merely because they deem the policy decision unwise or impractical.[101] With respect to agency regulations, generalist judges may not possess the institutional competence to second-guess the determinations of technically trained agency bureaucrats,[102] and creating a new basis on which private parties might challenge agency rules would likely lead to further ossification of an already rigid process.[103] Indeed, the European Court of Justice has developed a far more restrictive standing doctrine than have U.S. federal courts, such that the risk of challenges by disaffected regulated entities is greatly diminished.[104] Thus, American lawmakers should exercise great caution in replanting the European proportionality principle in American soil, given the significant disparities between the EU and U.S. regulatory climates.

At the same time, if properly modified for the American context, the proportionality principle might nevertheless serve a valuable function. In addition to maximizing regulatory benefits and minimizing costs, regulators should, as a general matter, ensure that regulatory disturbances to the free market are minimally disruptive. Empowering courts or some other independent entity to scrutinize agency regulations under some version of

100. RONALD M. LEVIN ET AL., ADMINISTRATIVE LAW OF THE EUROPEAN UNION: JUDICIAL REVIEW 149 (George A. Bermann eds., 2008).

101. *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that . . . authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded.").

102. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[The Supreme Court] has long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.").

103. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385, 1400–03, 1410–26 (1992) (explaining that public participation in administrative policymaking "has not evolved into the flexible and efficient process that its early supporters originally envisioned"). In the regulatory arena, judges may essentially apply a de facto tailoring analysis—without necessarily using that term—by setting aside agency determinations deemed "arbitrary and capricious," but there is no formal doctrine that holds agencies must use minimally restrictive means to achieve a desired result. *See, e.g.*, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 614–615, 640, 659 (1980) (interpreting a statute that arguably foreclosed consideration of regulatory costs to require the agency to make a threshold showing of risk prior to regulating).

104. *See supra* note 85 and accompanying text. Furthermore, even when a challenge to a European Union law actually is properly presented to the European Court of Justice, the court tenders a very high degree of deference and is generally loath to second-guess the determinations of the political branches. LEVIN, *supra* note 100, at 151.

the proportionality principle would help advance this goal.

(4) *Retrospective Analysis of Existing Laws*: In the past several years, administrative law scholars, politicians, and agency officials have come to embrace the principle of "retrospective review," contending that agencies should periodically reassess their existing corpus of rules to cull, modify, or strengthen regulations in response to new information. President Barack Obama has issued three executive orders on the subject, directing executive branch agencies to implement ongoing programs for reevaluating and updating regulations and encouraging independent regulatory agencies to do the same.[105] The Administrative Conference of the United States recently issued several recommendations to improve agencies' retrospective review activities.[106] Certain Senators and Congresspersons have attempted to go further, introducing a variety of bills that would strengthen retrospective review by creating an independent entity to evaluate existing regulations—rather than relying upon the agencies to self-assess.[107] Administrative law scholars have also put forward a variety of recommendations for enhancing retrospective review in the United States.[108]

Notwithstanding the flowering of interest in retrospective review and the high hopes expressed for its potential in alleviating the increasingly ponderous regulatory burden,[109] virtually every serious proposal for reevaluation of existing laws has focused exclusively on *rules* issued by administrative agencies, ignoring or dismissing the possibility of periodically reassessing and modifying *statutes* issued by Congress.[110] In instances in

105. Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012); Exec. Order No. 13,579 § 2, 76 Fed. Reg. 41,587, 41,587 (July 14, 2011); Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

106. *Adoption of Recommendations*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

107. *See, e.g.*, Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014, H.R. 4874, 113th Cong. (2014); Regulatory Improvement Act of 2014, H.R. 4646, 113th Cong. (2014); Regulatory Improvement Act of 2013, S. 1390, 113th Cong. (2013).

108. *See generally Improving Regulatory Performance: Lessons from the United Kingdom Before the S. Budget Comm. Task Force on Gov't Performance*, 112th Cong. (2011) (statement of Michael Freestone, Massachusetts Institute of Technology); MICHAEL MANDEL & DIANA G. CAREW, PROGRESSIVE POLICY INST., REGULATORY IMPROVEMENT COMMISSION: A POLITICALLY-VIABLE APPROACH TO U.S. REGULATORY REFORM (May 2013), *available at* http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf; Bull, *supra* note 63; Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. ONLINE 57 (2013).

109. *See* CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 180–86 (2013) (chronicling the successes of the Obama Administration's retrospective review efforts).

110. Historically, Congress has occasionally implemented protections to ensure that legislation does not outlive its useful lifespan, including statutory sunset provisions. Rebecca

which Congress delegates power exceedingly broadly to administrative agencies, focusing retrospective review efforts on existing rules rather than statutes is a sound approach, for the agency enjoys the discretion to modify the regulatory regime significantly. Nevertheless, in those instances when Congress has delegated more parsimoniously, an agency that determines certain changes to a regulatory program are appropriate while conducting retrospective review may lack the authority to effectuate those revisions absent specific authorization from Congress. In an era characterized by intense partisan gridlock, the likelihood Congress would respond to agencies' requests for appropriate statutory revisions is, lamentably, rather small.

In addition, retrospective review efforts have generally focused exclusively on updating preexisting regulations. Though some have proposed a more holistic process that focuses on the entire lifecycle of a regulation and develops a framework for future retrospective review when adopting new regulations,[111] the existing regulatory lookback initiatives have not emphasized this goal.

The European Union's practices may offer valuable insights worthy of consideration in any effort to reform the U.S. system. Following a number of recent reforms, new EU regulations and directives often include a framework to guide future reassessment and provide a metric by which the Commission can judge whether the law has achieved its intended objectives.[112] With respect to preexisting regulations and directives that may lack such a built-in reassessment plan, the Commission has also instituted a program of evaluation, which focuses on individual laws, and "fitness checks," which focus on entire policy sectors, to examine existing policies and streamline or modify those that have become outdated.[113] By focusing these retrospective review efforts on "primary legislation" in

M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1014–21 (2011). Though sunset provisions may diminish the risk that outmoded legislation will survive beyond its useful lifespan, they represent a rather blunt, inartful approach to achieving this purpose, given that retaining or recasting a statute may prove preferable to eliminating it entirely.

111. *See Adoption of Recommendations*, 79 Fed. Reg. at 75,116; *see also* J.B. Ruhl & James Salzman, *Regulatory Exit*, 68 VAND. L. REV. 1295, 1316–1320 (2015) (describing various ex ante "exit" strategies, whereby regulators establish criteria for terminating a regulatory intervention in the initial instance).

112. EUROPEAN COMMISSION, SEC (2009) 92, IMPACT ASSESSMENT GUIDELINES 49–50 (Jan. 15, 2009), *available at* http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf.

113. EUROPEAN COMMISSION, EVALUATION STANDARDS, *available at* http://ec.europa.eu/smart-regulation/evaluation/docs/standards_c_2002_5267_final_en.pdf (last visited Nov. 2, 2015); Press Release, European Commission, REFIT – Commission Making EU Law Lighter, Simpler and Less Costly (June 18, 2014), *available at* http://europa.eu/rapid/press-release_IP-14-682_en.htm.

addition to "secondary legislation"—i.e., regulations implemented by apolitical entities acting on delegated authority—and by integrating a retrospective component into prospective policymaking, the European Union achieves a level of comprehensiveness that is sorely lacking in the United States.

Again, the more logical organization of the EU system does not necessarily establish its superiority over its American counterpart. Notwithstanding the more comprehensive nature of the European Union's evaluations and regulatory "fitness checks," the standards deployed by the Commission when conducting these analyses are exceedingly vague and easily manipulable by bureaucrats intent upon retaining the status quo. The few publicly available documents associated with the European Union's Regulatory Fitness and Performance Programme (REFIT) and its evaluation initiative are replete with broad policy pronouncements and various factors the Commission considers when undertaking these analyses,[114] but they provide little in the way of an objective methodology by which to determine if a given law is the most effective mechanism of obtaining a specific regulatory benefit with the minimum incurrence of costs. With its heavier emphasis on quantifiable costs and benefits, the U.S. system of regulatory analysis is likely to produce more meaningful results—at least in the limited instances in which it is deployed. As such, an optimal program of retrospective review would combine the EU system's comprehensiveness with the U.S. system's analytical rigor.

III. "MARKET CORRECTIVE RULEMAKING"

A. *Translating EU Insights to the U.S. Context*

As the Part II demonstrated, the EU regulatory system, though it suffers from a number of significant flaws of design and execution, possesses a number of attractive features that may be worth emulating in efforts to address the limitations of the U.S. system highlighted in Part I. Nevertheless, the differences between the EU and U.S. systems of government are profound, such that direct importation of EU practices is

114. *See generally, e.g.*, EUROPEAN COMMISSION, COM (2014) 368 FINAL, REGULATORY FITNESS AND PERFORMANCE PROGRAMME (REFIT): STATE OF PLAY AND OUTLOOK (June 18, 2014), *available at* http://ec.europa.eu/smart-regulation/docs/com2014_368_en.pdf (generally describing the framework of the REFIT program and cataloguing results achieved to date but providing few details on how existing regulations and directives are analyzed); EVALUATION STANDARDS, *supra* note 113 ("Evaluation involves a judgment of interventions according to their results, impacts and needs they aim to satisfy. It is a systematic tool which provides a rigorous evidence base to inform decision-making and contributes to making Commission activities more effective, coherent, useful, relevant and efficient.").

likely to prove ineffective or counterproductive. Most significantly, the powers of the EU central government are considerably more circumscribed than those of its American counterpart.[115]

For purposes of regulatory interventions devised to correct market failures, the primary distinction between the U.S. and EU governments lies in the virtually unbounded power of the U.S. Congress to enact legislation designed to regulate commercial activity. Notwithstanding a series of Supreme Court decisions delimiting the scope of its powers under the Commerce Clause,[116] Congress retains the ability to regulate any commercial activity that produces an "effect" on either interstate or international commerce, including activity performed wholly within an individual state that nevertheless has implications for interstate commercial activity.[117] The EU government, like the U.S. Congress, is granted certain powers in the treaties governing the formation of the European Union, but none is as expansive as the Commerce Clause power contained in the U.S. Constitution. Indeed, so long as it is not infringing upon one of the civil liberties guaranteed in other provisions of the Constitution, the U.S. Congress may adopt any economic interventions it deems appropriate, and neither the courts nor any other institution will be empowered to set aside legislation that has proven overly costly or disproportionate to the underlying problem. Nevertheless, imposing some version of the proportionality principle or a regulatory impact analysis requirement upon Congress would require a constitutional amendment, a course of action that is likely neither feasible nor desirable.

Yet, as explored in Part I, Congress lacks the institutional expertise to carefully assess proposed economic interventions and design targeted, minimally invasive solutions to perceived market failures. It has partially

115. As numerous comparative law scholars have observed, the European Union more closely resembles the national government erected under the Articles of Confederation than it does the federal republic created by the U.S. Constitution. *See, e.g.*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1744–45 (2007); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1705 (2002).

116. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587, 2591 (2012) ("Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority."); United States v. Morrison, 529 U.S. 598, 613, 617 (2000) ("Thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); United States v. Lopez, 514 U.S. 549, 567 (1995).

117. *See* Gonzalez v. Raich, 545 U.S. 1, 17 (2005) (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)) ("Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.").

overcome this limitation by delegating sweeping powers to administrative agencies, which are more likely to possess the relevant expertise and more easily held accountable for devising a rational solution to a given problem through executive review of certain agency rulemakings and judicial review of final agency determinations. Nevertheless, U.S. administrative agencies are not subject to the comprehensive cost-benefit analysis, proportionality, and retrospective review requirements that prevail in the European Union. As a consequence, many regulations designed to correct certain market failures are not justified on the basis of the costs they impose on society,[118] and even cost-benefit justified regulations may prove overly burdensome in comparison to more narrowly tailored alternatives. Furthermore, even if certain interventions are economically justified when initially adopted, market forces may evolve, and an efficient solution may become increasingly inefficient over time.

Recognizing this tendency of U.S. agencies to misallocate regulatory resources, conservatives in Congress have responded in two distinct ways. First, they have largely refused to authorize any additional market interventions, contending that government-based solutions are necessarily less efficient than those that emerge organically from market forces.[119] Second, contending that the administrative state lacks "democratic legitimacy" insofar as it relies upon unelected bureaucrats to render policy determinations, they have attempted to reassert Congress's primary decisionmaking role or at least to enhance Congress's oversight of agency determinations.[120] Neither approach holds much promise for improving governmental policymaking.

As to the former strategy, though anarcho-capitalists have articulated a sophisticated case for relying exclusively upon private sector entities to perform the erstwhile functions of the modern state,[121] most conservatives

118. *See* BREYER, *supra* note 88, at 24–27 tbl.5 (demonstrating the wide range of regulatory costs per statistical life saved).

119. Though the number of bills passed in any given session of Congress is an imperfect measure of legislators' willingness to intervene in the market—as not all legislation necessarily disrupts existing market forces—the historically low activity of recent Congresses coupled with explicit statements by Senators and Congresspersons questioning the role of an activist government certainly suggests that the appetite for such interventions is at a low ebb. *See* Drew DeSilver, *Congress Ends Least-Productive Year in Recent History*, PEW RESEARCH CTR. (Dec. 23, 2013), http://www.pewresearch.org/fact-tank/2013/12/23/congress-ends-least-productive-year-in-recent-history/ (reporting that former House Speaker John Boehner said that Congress "should not be judged on how many new laws we create, we ought to be judged on how many laws that we repeal").

120. *See supra* note 13 and accompanying text.

121. *See, e.g.*, FRIEDMAN, *supra* note 38, at 30–38, 114–20 (explaining how genuine monopolies almost never occur in a completely free market). *See generally* MURRAY N. ROTHBARD, FOR A NEW LIBERTY (2d ed. 2006) (setting forth a framework for a society

would concede that at least limited government intervention is required to correct for certain market imperfections.[122] Further, conservatives' knee-jerk opposition to any new market intervention has largely produced an equal but opposite reaction on the part of progressives, who vehemently defend existing interventions, including those of questionable utility, for fear of eroding the regulatory state, thereby complicating legislative efforts to streamline or eliminate existing interventions. So long as bipartisan compromise remains necessary to achieve governmental reform, a doctrinaire adherence to radical libertarianism is likely a more effective strategy for political martyrdom than for effectuating meaningful deregulation.

As to the latter strategy, though one can debate whether Congress or administrative agencies offer a more attractive opportunity for average citizens to influence governmental policymaking,[123] reallocating decisionmaking power from agencies to Congress seems likely to diminish rather than improve the quality of regulatory interventions. As explained in Part I, agencies are far more capable of tailoring market interventions in light of the gravity of the underlying problem. Furthermore, though Congress's accountability to the electorate may, in theory, restrain its ability to expand its own powers by intruding further and further into the free market, this democratic check is far more compelling in theory than in practice. First, Congress may face enormous public pressure to act in the face of a high profile catastrophe such as a major threat to the environment or a significant economic downturn, regardless of the economic wisdom of regulatory intervention.[124] Second, as regulatory capture theory has shown,

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governed by the principles of anarcho-capitalism).

122. *See, e.g.*, DUDLEY & BRITO, *supra* note 33, at 12–16; MILTON FRIEDMAN, CAPITALISM AND FREEDOM 25–26 (40th ed. 2002) ("However attractive anarchy may be as a philosophy, it is not feasible in a world of imperfect men. . . . The major problem in deciding the appropriate activities of government is how to resolve . . . conflicts among the freedoms of different individuals.").

123. *Compare* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 71–72 (2002) ("All federal agencies constitute an added measure of distance from the governed; they serve as a semi-permeable barrier for citizens to interact with their government. To some extent, auxiliary protections like citizen suits can offer some level of government-citizen interaction, but it is not the type of direct relationship valued in democratic systems."), *with* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1542 (1992) ("Administrative agencies, however, fall between the extremes of the politically over-responsive Congress and the over-insulated courts. Agencies are therefore prime candidates to institute a civic republican model of policymaking.").

124. This tendency to focus on highly salient phenomena to the exclusion of less visible, if equally important, risks grows directly from the behavioral economic principle of availability. *See* KAHNEMAN, *supra* note 97, at 138–40. Absent some fundamental change in human nature, this is likely to remain true of government decisionmakers and of the broader electorate they represent for the foreseeable future.

legislators will typically be quite solicitous of the special interests that fund their reelection bids, and the "will of the majority" is therefore often far less significant than the preferences of wealthy campaign donors.[125] Though regulators, too, are highly susceptible to capture, they are at least somewhat insulated by civil service protections[126] and an *esprit de corps* arising from internalization of the agency mission.[127]

In this light, a more productive approach would take the existence of sweeping delegations to administrative agencies as a *fait accompli*: as regulatory problems became increasingly complex over the course of the nineteenth and twentieth centuries, some abdication of policymaking power by generalist legislators in favor of specialist technocrats was and remains inevitable. Rather than attempting to reassert a role it is not competent to discharge, Congress should strive to communicate its overarching policy goals to agencies with as much clarity and precision as possible, thereby minimizing principal-agent problems.

In the sphere of regulatory interventions designed to correct perceived market failures, it is fairly clear that this is not happening. Instead, in the increasingly rare instances in which a majority of legislators agree upon the need to correct a purported market failure—often in the wake of a failure of existing regulations to prevent a highly visible catastrophe[128]—Congress assigns sweeping remedial powers to one or more agencies. The agencies, in turn, draft regulations, which may or may not be subject to cost-benefit analysis requirements, depending upon the importance of the rule[129] and the independence *vel non* of the issuing agency.[130] Once adopted, such rules

125. *See* ESKRIDGE, *supra* note 76, at 56–60. This dynamic has likely become even more severe in the wake of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), which struck down restrictions on independent political expenditures by non-profit organizations. *Id.* at 372.

126. *See* Pendleton Civil Service Reform Act, 22 Stat. 403–04 (1883).

127. *See, e.g.*, John D. DiIulio, Jr., *Principled Agents: The Cultural Bases of Behavior in a Federal Government Bureaucracy*, 4 J. PUB. ADMIN. RES. & THEORY 277, 281 (1994) (noting "the simple failure of most rational choice theorists to take nonpecuniary and other intangible incentives seriously and to investigate the conditions under which it becomes rational for individuals to behave in a public-spirited manner"); Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 487 (2012) ("The public choice challenge to inside-out accountability ignores the potential of professionalization and organizational culture to promote other-regarding behavior.").

128. Bull, *supra* note 63, at 308–310.

129. Exec. Order No. 12,866 § 6(a)(3)(B)–(C), 58 Fed. Reg. 51,735, 51,740–41 (Oct. 4, 1993).

130. DAVID E. LEWIS & JENNIFER L. SELIN, ACUS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 114 (1st ed. 2012) (listing the agencies exempted from submitting proposed and final rules to OIRA for review); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 835–42 (2013) (describing exemption from OIRA regulatory review as one hallmark of agency

generally remain on the books indefinitely, often long after they have outlived their useful lifespans.

The remainder of Part III attempts to construct an alternative mechanism by which Congress could more effectively constrain agencies' discretion in the initial instance while nevertheless fully exploiting the agencies' superior technical capabilities for identifying and responding to market failures. In so doing, it draws heavily upon the comparative strengths of the EU system, creating a novel set of rulemaking procedures that would rely upon early stakeholder input, cost-benefit analysis, the proportionality principle, and periodic retrospective review to design narrowly tailored regulatory interventions that could be modified or phased out as circumstances evolved. Congress would, of course, retain complete autonomy in determining whether to invoke such procedures or instead to rely upon traditional, open-ended delegations of power. Though regulations adopted under the proposed system of "market corrective rulemaking" (MCR) would admittedly be more susceptible to challenge than those promulgated under the traditional informal rulemaking process, the proposed reform might ultimately create a via media between the extremes of virtually immortal regulatory interventions and the complete absence of regulation even in the face of clear market failures—the two alternatives that have lamentably come to characterize the modern regulatory state.

B. Designing "Market Corrective Rulemaking"

The system of "market corrective rulemaking" proposed in this Article would represent a new track for agency rulemaking activity, distinct from the procedures for informal rulemaking and formal rulemaking created by the APA.[131] Like formal rulemaking, it would require explicit statutory language directing agencies to use such procedures in lieu of the informal rulemaking default.[132] When a bill included such language, either the CBO or a similar entity would first analyze the existing economic and regulatory landscape to gather any evidence of a market failure.

If the bill passed, it would trigger a series of obligations on the part of the implementing agency. First, prior to drafting a rule and issuing a notice of proposed rulemaking, the agency would seek input from relevant stakeholders. The outreach effort would facially resemble the practices of

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independence).

131. 5 U.S.C. §§ 553, 556–57 (2012).

132. *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 240 (1973) (determining that statutory reference to a "hearing" was insufficient to trigger formal rulemaking requirements).

the European Commission, though it ideally would include a much broader array of stakeholders than the EU process and would retain traditional notice-and-comment procedures. Second, the agency would prepare cost-benefit analyses for both the proposed course of action and the most promising alternatives, which it would submit to OIRA regardless of the projected economic impact of the proposed rule or the "independence" *vel non* of the submitting agency. Third, the agency would consider the burden that the proposed rule would impose upon regulated entities, observing a modified version of the EU proportionality principle. Though the agency need not always select the least burdensome approach, given that a costly regulation may nevertheless produce larger net benefits than a less disruptive alternative, it should be mindful of any dislocations caused even by regulations with large economic benefits, particularly those creating disproportionate harms for small- and medium-sized enterprises and other entities with minimal political clout. Finally, the agency should periodically reassess the rule adopted, readjust it as necessary in light of changed circumstances, and terminate the intervention when it determines that the market has evolved such that the external market manipulation is no longer required.

The remainder of this subpart examines each step of the MCR process in detail, exploring how Congress might use it to constrain agency discretion in instances in which it desires a narrowly tailored, limited economic intervention to address a market failure.

(1) *Invocation of MCR*: As explored in Part I, Congress generally lacks the institutional capacity to study underlying market forces, determine if some form of external intervention would lead to a more efficient or otherwise normatively preferable result, and then implement a sophisticated solution designed to effectuate that result with minimal disruption to underlying market forces. MCR seeks to shift most of this burden to administrative agencies, tasking Congress merely with articulating its overarching policy goals and then directing agencies to follow a formal set of procedures designed to guide the agencies' efforts to achieve those goals. Nevertheless, Congress should possess at least some evidence concerning the supposed market failure it is attempting to redress, so as to enable it to provide a broad-brush description of the solution it envisions.

Notwithstanding the extensive literature on the existence and nature of market failures, no economist has yet devised a mathematical model by which one can survey the underlying economic data and reach an objective conclusion concerning the presence or absence thereof. Economists and regulatory experts largely agree that excessive market concentration, externalities, public good problems, and information asymmetries can skew underlying market incentives in a way preventing the maximization of net economic utility.[133] By contrast, economists and regulatory experts have achieved little consensus on whether state intervention can restore efficient market forces and, if so, how to design such interventions.[134] In that light, attempting to design a "litmus test" for the existence of a legislatively correctable market failure would prove a politically fraught undertaking that would defy any objective solution.

Nonetheless, a Senator or Congressperson contemplating a bill designed to remedy a perceived market flaw might call upon economists to outline the nature and gravity of the underlying issue. Though the costs and benefits of any market intervention may prove impossible to quantify with any degree of precision at this early stage, the analysis should, to the extent feasible, identify the key tradeoffs involved. This investigative function might be assigned to the CBO, which has traditionally scored legislation based on projected budgetary impact but has not typically analyzed costs and benefits of pending bills,[135] or to some newly created independent Congressional agency.

In the draft legislation, Congress should not only identify the market failure that it seeks to correct but also outline the nature of the solution it envisions. As will be explored in further detail below, agencies tasked with drafting rules pursuant to MCR procedures would both estimate the economic costs and benefits of the proposed market intervention and determine the least burdensome approach to remedying the underlying problem—i.e., proportionality analysis. Though the solution producing maximum net benefits may often be the least burdensome, this need not be the case. For instance, a regulation producing $100 million in costs and $200 million in benefits would be preferable to one producing $10 million in costs and $50 million in benefits if the goal were simply to maximize benefits, yet the latter approach might be optimal if the goal were to minimize disruption to existing market forces.

Thus, to the extent possible, Congress should offer general guidance to the agency concerning (1) the nature of the market failure it seeks to

133. *See* DUDLEY & BRITO, *supra* note 33, at 12–15.

134. *Compare* STIGLITZ, *supra* note 3, at 33–34 ("Markets by themselves often fail to produce efficient and desirable outcomes, and there is a role for government in correcting these market failures, that is, designing policies (taxes and regulations) that bring private incentives and social returns into alignment."), *with* FRIEDMAN, *supra* note 38, at 152 ("Under a government, good law is a public good. That is why it is not produced.").

135. CBO, AN INTRODUCTION TO THE CONGRESSIONAL BUDGET OFFICE 2 (Nov. 2012), https://www.cbo.gov/sites/default/files/cbofiles/attachments/2012-IntroToCBO.pdf ("CBO provides formal, written estimates of the cost of virtually every bill 'reported' (approved) by Congressional committees to show how the bill would affect spending or revenue over the next 5 or 10 years, depending on the type of spending involved.").

remedy, (2) any costs and benefits that it considers especially germane to devising a solution (particularly social benefits that may not be easily quantifiable), and (3) whether it envisions a solution that maximizes net economic utility or one that minimally disrupts prevailing market forces. Providing such guidance may not prove practicable in all cases, but doing so will help ensure that the agency carries out its legislative mandate with the highest possible degree of fidelity.[136]

Of course, in certain instances, including many involving purported market failures, Congress may determine that the rigorous procedural requirements and enhanced opportunities for stakeholder challenges to agency rules associated with MCR will unnecessarily hamstring regulators' efforts to address a social ill. Congress often tasks agencies with developing regulations designed to promote equal opportunity, social justice, morality, human dignity, and numerous other non-quantifiable public benefits. Though one could characterize the inability of a system of laissez-faire to produce these benefits as a "market failure," the overall economic impact of such laws is virtually impossible to calculate, and MCR would likely prove inappropriate in those contexts.[137]

In that light, it is imperative that Congress lucidly expresses its intent for agencies to apply MCR procedures. A productive analogy is the invocation of formal rulemaking, wherein courts have applied a clear statement rule and required an unmistakable expression of Congressional intent prior to mandating that agencies use such cumbersome procedures.[138] Accordingly, unless a statute actually contains the phrase "market corrective rulemaking," a court should uphold an agency's determination to use traditional informal rulemaking procedures in lieu of MCR. This is critical not only to minimize uncertainty amongst regulators but also to facilitate compromises amongst legislators. One can certainly envision a scenario wherein a Senator or Congressperson may be reluctant to authorize an open-ended market intervention for fear that it will prove impossible to

136. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 125–28 (1994) (comparing statutory interpretation to a principal-agent relationship and contending that the agent often must elaborate upon or even contravene the explicit instructions of the principal in order to faithfully execute his broader charge).

137. For instance, the DOE's work in promoting rigorous educational standards nationwide produces exceedingly large positive externalities, creating both a more competitive workforce and a more civically engaged citizenry. *See* HARVEY S. ROSEN, PUBLIC FINANCE 105 (7th ed. 2005) ("[Primary and secondary] schooling not only increases an individual's earning capacity, but it also reduces crime and contributes to the literate and well-informed populace that is necessary for a smoothly functioning modern democracy."). Calculating the pecuniary benefits of this mission would be a challenging undertaking, however, and requiring cost-benefit analysis of the associated regulations may prove an unnecessary or even counterproductive exercise.

138. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 240 (1973).

reverse but may be amenable to a more narrowly tailored intervention devised via MCR procedures. Legislators should be on notice that only bills containing a specific verbal formulation will lead to MCR procedures and should vote accordingly.

(2) *Structured Stakeholder Input*: From the Progressive Era until the present day, governmental regulation has traditionally been associated with a "liberal," left-of-center worldview.[139] The image of captains of industry despoiling the environment and oppressing the great mass of the citizenry in pursuit of the almighty dollar, and of indefatigable public servants striving mightily—if often unsuccessfully—to curtail their abuses, has become emblazoned in the public consciousness. In reality, though large corporations have indeed committed numerous breaches of the public trust and have often opposed regulatory interventions, the popular perception of "industry v. government" is vastly oversimplified, particularly in an era increasingly characterized by so-called "crony capitalism."[140] Indeed, numerous economists have criticized regulatory intervention as an inherently *conservative* force, insofar as it tends to favor incumbent firms at the expense of upstart competitors and stifle the forces of creative destruction, which drive economic growth by clearing out increasingly dysfunctional firms and opening new opportunities for more efficient, entrepreneurial replacements.[141] Older, larger firms are both more familiar with the existing regulatory landscape and more capable of internalizing the costs associated with compliance. Thus, in what has been fancifully labeled the "bootleggers and Baptists" phenomenon, legacy corporations may formally or informally ally with progressive groups to promote seemingly public-spirited regulations that have the salubrious side-effect of preserving existing market shares.[142]

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139. *Compare* REPUBLICAN 2012 PLATFORM: WE BELIEVE IN AMERICA 1, *available at* http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf ("Excessive taxation and regulation impede economic development."), *with The 2012 Democratic Platform*, DEMOCRATS.ORG, https://www.democrats.org/party-platform (last visited Nov. 2, 2015) ("Efficient and effective regulations enforce common sense safeguards to protect the American people.").

140. *See, e.g.*, Walter Donway, *Crony Capitalism versus "Making" Money*, *in* THE REPUBLICAN PARTY'S CIVIL WAR 115–16 (Edward Hudgins ed., 2014) ("We see, today, the result of decades and decades of relentless efforts to erode the separation of government and economy. Businessmen themselves often spearheaded these efforts; they were the type of businessman who finds it easier to get a subsidy than earn a profit, easier to shackle a rival than compete."); HOLCOMBE & CASTILLO, *supra* note 60, at 90 ("Interest group politics has gained increasing influence over government decision-making, opening the door to crony capitalism and leading to what [Mancur] Olson has described as the decline of nations.").

141. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–85 (3d ed. 1950).

142. *See* ADAM SMITH & BRUCE YANDLE, BOOTLEGGERS AND BAPTISTS 3 (2014); *see also*

In this light, one can reasonably expect large, incumbent firms to advocate robust regulatory interventions in certain contexts, either by arguing for such actions directly or, more surreptitiously, by acting by proxy through noble-minded organizations seeking to advance the public good.[143] Given the substantial expenses associated with lobbying Congress, large firms possess a considerable advantage over their smaller competitors in seeking statutory change. In the regulatory context, though the notice-and-comment process is theoretically open to any interested party, large companies are still far more favorably positioned than small businesses insofar as they can more easily marshal the resources required to submit a persuasive comment to the rulemaking agency.[144]

MCR would attempt to correct for this imbalance by explicitly promoting a more inclusive consultation of stakeholders during the rule-drafting stage. In so doing, it would draw inspiration from the European approach, though one must remain mindful of the wide gulf between theory and practice in the European stakeholder input process. Nominally, the European Commission seeks balanced stakeholder input in certain directives and regulations by inviting not only industry but also various civil society organizations to consult with Commission experts prior to their drafting of a proposed law.[145] In theory, this corrects for the numerical and financial advantages of corporate groups by preserving an equal role for organizations tasked with representing the broader public interest. Yet, in practice, the European process is arguably even more susceptible to capture than its American counterpart insofar as the Commission tends to consult only with very large European companies and with civil society groups that represent relatively narrow tranches of the broader public interest, such as unions.[146] As a general matter, small companies, foreign firms, and public interest organizations that have not achieved such favorable treatment lack a seat at the table.[147]

An ideal model would couple the inclusiveness of the U.S. notice-and-

DUDLEY & BRITO, *supra* note 33, at 18–19; K. William Watson & Sallie James, *Regulatory Protectionism: A Hidden Threat to Free Trade*, 723 POL'Y ANALYSIS 1, 5 (2013).

143. For instance, if an automobile manufacturer pioneered a new process that allowed it to improve the fuel economy of its fleet of vehicles greatly, it might seek to magnify its competitive advantage by lobbying for more stringent fuel standards. Further, if the company were especially sophisticated, it may choose to fund environmental preservation organizations that seek similar aims rather than advocating this change directly, thereby avoiding any criticism for its clearly profit-motivated activities.

144. *See* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 128–129 (2008) (noting that studies have shown comments by business interests outnumber other sources and have a disproportionate influence on the development of rulemaking).

145. *See generally* EUROPEAN COMMUNITIES, *supra* note 78.

146. *See* Donnan, *supra* note 79.

147. *Id.*

comment process with the balance at least nominally achieved by the EU process, thereby correcting for the outsized influence of large corporations. In fact, an oft-overlooked U.S. practice known as negotiated rulemaking achieves precisely this result. Though it would be far too time and resource intensive to deploy in all instances of MCR, agencies' experiences in the use of negotiated rulemaking could provide useful insights for structuring more inclusive, representative stakeholder input procedures.

In the negotiated rulemaking process, the agency convenes an advisory committee that includes representatives from the key stakeholders interested in the rule that the agency proposes to issue.[148] The Negotiated Rulemaking Act explicitly requires that the committee include representation from the major interest groups that will be affected by the proposed rule.[149] The committee members ideally reach consensus upon the text of the rule, and the agency then issues a notice of proposed rulemaking containing that text.[150] The proposed rule still proceeds through the traditional notice-and-comment process, affording any groups that may not have participated in the negotiated rulemaking committee an opportunity to provide input.[151]

Unfortunately, convening a negotiated rulemaking committee can be a very time-intensive endeavor. Such committees are subject to the Federal Advisory Committee Act (FACA),[152] and organizing and chartering an advisory committee has become a tortuous, protracted process at many agencies.[153] For this and other reasons, negotiated rulemaking has unfortunately fallen into disuse in recent years,[154] with the number of negotiated rulemaking committees dwindling to a fraction of the highs reached in the late 1990s.[155] Negotiated rulemaking itself is likely to prove impracticable in most instances, but the significant benefits of early stakeholder input justify alternative approaches to obtaining information from balanced groups of outside interests prior to drafting a proposed rule.

148. 5 U.S.C. §§ 562(7), 563 (2012).

149. *Id.* § 563(a)(1)–(3).

150. *Id.* § 563(a)(7).

151. *Id.*

152. *Id.* § 562(7).

153. REEVE T. BULL, THE FEDERAL ADVISORY COMMITTEE ACT: ISSUES AND PROPOSED REFORMS 47–49 (Sept. 12, 2011), *available at* http://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf.

154. *See* Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 996 (2008) (finding an overall decline in the number of negotiated rulemakings over the course of the early 2000s and an especially precipitous decline in the number of such committees voluntarily chartered by agencies).

155. *See* BULL, *supra* note 153, at 68 (finding a decline in the number of negotiated rulemaking committees from a high of fourteen in 1999 to three in 2011, the most recent date for which data was available).

In this light, agencies may wish to explore a range of early public participation mechanisms, depending upon the issues at play and the range of affected interests. In some cases, the agency may simply wish to gauge the reaction of various interest groups to a proposed regulatory action, in which case the agency might merely informally reach out to key players who might not otherwise take the initiative to submit public comments.[156] In other cases, the agency may wish to convene stakeholders in a group setting, allowing them to interact with one another and discuss the tradeoffs involved in the potential regulatory options. So long as the assemblage of stakeholders is not offering a group policy recommendation to the agency, such a meeting should not trigger FACA.[157] In other instances, the agency may determine that there is a limited group of stakeholders and that they can reach a non-zero sum solution by negotiating the text of a proposed rule, in which case negotiated rulemaking might prove optimal.[158]

In short, MCR would preserve the agency's discretion to tailor the public input mechanism used in light of the nature of the issues and interests at stake, but it would require some form of targeted outreach prior to the issuance of a notice of proposed rulemaking in addition to the traditional notice-and-comment process. Specifically, it would require that the agency consider the full panoply of affected interests and reach out to a diverse set of stakeholders to ensure that all relevant interests are represented. In addition, it would require the agency to consider the "relevant matter presented" in the public input received, as it currently must with respect to public comments submitted via the notice-and-comment process.[159] Given the difficulty of identifying the key stakeholder

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156. Prior to the issuance of a notice of proposed rulemaking, agencies are free to consult informally with stakeholders. Iowa State Commerce Comm'n v. Office of the Fed. Inspector of the Alaska Natural Gas Transp. Sys., 730 F.2d 1566, 1576 (D.C. Cir. 1984). After the issuance of a notice of proposed rulemaking, agencies still are, as a general matter, free to solicit outside input. Sierra Club v. Costle, 657 F.2d 298, 403–04 (D.C. Cir. 1981). Notwithstanding the lack of any general prohibition on receiving such ex parte communications, some agencies have adopted policies that limit their capacity to do so. *See* SFERRA-BONISTALLI, *supra* note 59, at 40 ("Agency practice seems to occur on a spectrum: some agencies permit or even welcome *ex parte* communications; other agencies discourage or refuse them.").

157. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 913 (D.C. Cir. 1993). So long as the agency does not take an active hand in convening the advisory committee, it is not subject to the strictures of FACA. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 462–63 (1989); Washington Legal Found. v. U.S. Sentencing Comm'n, 17 F.3d 1446, 1450 (D.C. Cir. 1994). Similarly, if the individuals on the committee who are not federal employees do not have any formal vote in a policy prescription offered to the agency, FACA is not triggered. *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005).

158. 5 U.S.C. § 563 (2012); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 48–49 (1982).

159. 5 U.S.C. § 553(c).

groups in the initial instance, any court reviewing the agency's efforts to ensure balance would tender a high degree of deference, as explained in greater detail in Part III.C.

By promoting such broad inclusivity, MCR helps combat the phenomenon by which large firms, either acting alone or in tacit collusion with public interest organizations, advocate regulatory interventions that have the effect of promoting market concentration and placing small firms at a competitive disadvantage. In the instance of a legitimate market failure, the benefits of regulatory intervention may justify the concomitant barriers to entry created for small and medium enterprises, but agencies should ensure that all sides are heard prior to taking such a course of action.

(3) *Cost-Benefit Analysis*: As detailed in Parts I and II, the application of cost-benefit analysis to regulatory decisionmaking is somewhat sporadic under current law. Congress is under no formal requirement to consider the costs and benefits of legislation. At the agency level, independent regulatory agencies are not subject to the cost-benefit analysis requirements of Executive Order 12,866,[160] though many are required to consider regulatory costs and benefits by statute.[161] Executive branch agencies must consider costs and benefits for all proposed regulations but are only required to prepare formal cost-benefit analyses subject to review by OIRA for "significant regulatory actions"—i.e., those exceeding $100 million in annual economic impact.[162] This contrasts unfavorably with the EU system, whereby the Commission conducts impact analyses for regulations and directives, though the Commission arguably conducts a much less rigorous cost-benefit analysis than do U.S. agencies.[163]

Though one Congress cannot constitutionally bind subsequent Congresses to consider economic costs and benefits when drafting new legislation,[164] it can direct administrative agencies to do so. MCR procedures would, as a default, require the agency to quantify the regulatory costs and benefits associated both with the preferred approach and viable alternatives and to justify the rule adopted in economic terms. Nevertheless, in certain instances, Congress may wish to depart from that

160. *See* LEWIS & SELIN, *supra* note 130, at 114.

161. *See* COPELAND, *supra* note 48, at 38–55.

162. Exec. Order No. 12,866 §§ 3(f), 6(b)(1), 58 Fed. Reg. 51,735, 51,738, 51,742 (Oct. 4, 1993); COPELAND, *supra* note 48, at 6–7 n.9.

163. *See* PARKER & ALEMANNO, *supra* note 91, at 24–25 (noting that U.S. regulators typically rely on a quantified cost-benefit analysis while EU regulators favor a more holistic approach).

164. United States v. Winstar Corp., 518 U.S. 839, 872–73 (1996); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermuele*, 91 CAL. L. REV. 1773, 1775 (2003).

default, and MCR would preserve its flexibility to do so. In some cases, Congress may determine that certain regulatory benefits merit special consideration, even if their monetary value is not readily quantifiable. For instance, a regulation requiring companies to disclose the presence of genetically-modified organisms in food products may create certain psychological benefits for consumers—and mitigate information asymmetry—though those benefits are virtually impossible to quantify. Were Congress to adopt a law authorizing the Food and Drug Administration to implement such disclosure requirements under MCR procedures, it might specifically highlight the benefits it believes such a disclosure regime would create.

By the same token, if Congress prefers that the agency pursue a course of action other than maximizing economic benefits and minimizing costs, it should clearly convey that intention in the associated statutory text. The next subpart will explore the proportionality principle, which holds that regulators should strive to minimize disruptions of prevailing economic forces. In some cases, this principle may stand in some tension with the benefit-maximizing approach. For instance, decreeing that all factories adopt a new technology that reduces carbon emissions by eighty percent might produce significant economic benefits by mitigating the effects of climate change, yet such a "command-and-control" solution may prove unnecessarily disruptive to the energy market. By contrast, a "cap-and-trade" system may create smaller net benefits insofar as it produces less drastic reductions in carbon emissions, yet such an approach may be deemed a more "proportionate" response to the environmental threat. Though Congress will generally be unable to expatiate upon its preferred approach in any degree of detail, it should at least identify considerations other than the maximization of net benefits it believes the implementing agency should consider.

The agencies, in turn, will conduct a formal cost-benefit analysis of every rule adopted under MCR procedures, which OIRA will review as if it were a "significant regulatory action" issued by an executive branch agency.[165] OIRA should assume that Congress intends for the agency to maximize net economic benefits—unless the statutory text suggests otherwise or the proportionality analysis identifies compelling countervailing considerations—and should scrutinize the regulation accordingly. Once finalized, the rule will be subject to judicial review, permitting private litigants who can establish standing to challenge the agency's regulations as "arbitrary and capricious" for failure to take account of relevant costs and benefits or to entertain regulatory alternatives that may prove more cost-

165. COPELAND, *supra* note 48, at 15.

effective.[166] Given the uncertainty associated with the cost-benefit inquiry, courts should exhibit a high degree of deference to the agency's determination, as will be discussed in greater detail in Part III.C.

(4) *Proportionality Analysis*: Notwithstanding its fundamental importance to EU law, the principle of proportionality remains a somewhat amorphous concept. At the simplest level, it essentially represents a tailoring analysis, ensuring that the means adopted to address a particular issue are not disproportionate to the underlying problem.[167] If conceived in this manner, the principle is essentially duplicative of the cost-benefit inquiry: so long as the forecasted costs of a proposed regulatory intervention do not greatly exceed the projected benefits, then the solution is "proportionate" to the underlying problem. If, on the other hand, the principle is construed as a requirement that EU institutions adopt a minimally invasive solution to potential regulatory problems, it comes to resemble a non-interventionist default or a preference for delegating power to lower levels of government.[168]

For purposes of MCR procedures, proportionality analysis would remain conceptually distinct from the cost-benefit inquiry, focusing on the displacement of underlying market forces caused by a proposed intervention (and ignoring the economic benefits it might create). The overall analysis would be roughly modeled on the constitutional inquiry applied in due process and equal protection cases. Rather than including three distinct levels of scrutiny (rational basis, intermediate scrutiny, and strict scrutiny),[169] the analysis would involve a sliding scale depending upon the economic costs of the proposed regulation. For relatively inexpensive regulations, the agency would enjoy a wide degree of latitude in crafting a regulatory intervention and need not perform much additional analysis

166. 5 U.S.C. § 706(2)(A) (2012).

167. *See* Case C-84/94, United Kingdom v. Council, 1996 E.C.R. I-5755, I-5811.

168. In the United States, the latter principle is embodied in the Tenth Amendment. U.S. CONST. amend. X. Though case law has increasingly treated the Tenth Amendment as a "tautology" that has little legally operative effect, it provides at least an aspirational preference for concentrating certain powers in the states—even in instances in which the federal and state governments may possess overlapping jurisdiction. *See* New York v. United States, 505 U.S. 144, 156–57 (1992) ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."). The EU treaties express fealty to this principle through the doctrine of subsidiarity, which establishes a preference for member state rather than EU-wide action in areas of shared competency. Treaty on European Union art. 3b, Feb. 7, 1992, 1992 O.J. 191.

169. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 529–31 (2001) (describing the three levels of constitutional scrutiny).

beyond the cost-benefit inquiry. For costlier regulations, the agency would need to scrutinize the nature of the regulatory burden more closely, even in instances in which benefits outstrip costs. For instance, the agency should examine distributional impacts: if the costs fall primarily on small businesses, consumers, or some under-represented entity, the agency may wish to consider less disruptive alternatives, even if they produce smaller net benefits.

In contrast to the European Union, in which regulated entities are unlikely to overcome the significant hurdles required to establish standing,[170] private parties would be able to challenge the agency's decision on proportionality grounds on judicial review under the "arbitrary and capricious" standard.[171] For minimally burdensome regulations, the court would apply a very generous tailoring analysis, akin to a somewhat more searching version of the "rational basis" review applied when addressing constitutional problems.[172] As the cost of the regulation increases, the court would more closely parse the agency's findings, ensuring that it gave some consideration to any special burdens created for certain classes of regulated entities and requiring some level of justification for imposing these burdens. Even in these cases, the tailoring inquiry would remain much less stringent than that applied even on "intermediate scrutiny,"[173] for the calculus of determining which regulations create "disproportionate" harms is necessarily subjective and amorphous, especially in those instances in which the agency must choose between a heavily burdensome intervention that produces large monetary benefits and a less burdensome intervention that produces smaller benefits. As will be explained in more detail in Part III.C, the court would focus simply on ensuring that the agency considered the relevant factors rather than second-guessing its policy judgments.

Congress can, of course, override default MCR procedures by emphasizing certain factors in the authorizing statute. As a general matter, agencies undertaking MCR would attempt to maximize economic benefits while minimizing market disruption (and balance those two desiderata

170. *See* TFEU, *supra* note 67, art. 263, at 162; STRAUSS, *supra* note 81, at 25–26.

171. 5 U.S.C. § 706(2)(A).

172. *See* CHEMERINSKY, *supra* note 169, at 544 ("Under the rational basis test the Court will allow laws that are both significantly underinclusive and overinclusive.").

173. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 569–70 (1980) (describing the tailoring inquiry under intermediate scrutiny to require the law to be "no more restrictive than necessary"); Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 84–85 (2006) ("The tailoring requirement of conventional intermediate scrutiny also can be understood as a form of balancing. When courts consider alternative ways that the state can further its interests, they take into account the increased cost or loss in effectiveness of alternative regulations, as well as the degree to which alternative regulations mitigate the burden on the right.").

against one another, if they conflict), and courts would tender a high degree of deference to the agency's conclusion. If, however, the authorizing statute directed agencies to be especially solicitous of impacts on small businesses, the agency would place greater emphasis upon the proportionality analysis—and less upon the maximization of net benefits. By contrast, if the authorizing statute emphasized the scope of the underlying market failure and the need for government intervention to achieve significant public benefits, considerations of benefit maximization would trump those of impact minimization. In short, MCR merely provides a set of presumptions concerning the goals that Congress wishes to advance when adopting narrowly tailored market interventions, and Congress can easily override those presumptions by expressing a contrary intent in the relevant legislation.

(5) *Retrospective Review and Regulatory Retirement*: In the last several years, administrative law scholars have increasingly recognized the risks associated with the accumulation of regulations over time, no matter how reasonable or seemingly necessary any one regulation may be in isolation.[174] Notwithstanding the various retrospective review initiatives created by statute and executive order,[175] agencies generally lack the incentives, resources, and expertise to identify and cull unduly burdensome regulations.[176] Congress, in turn, lacks the expertise or the political will to carefully scrutinize the regulatory landscape and implement appropriate statutory relief, given the fact that parties enjoying concentrated regulatory benefits will lobby key legislators in defense of the status quo.[177] One possible solution to this conundrum is to empower regulated entities to challenge existing regulations as unnecessary or overly burdensome. Such an approach would need to be narrowly tailored and place a heavy burden of persuasion upon the challenging entities, lest industry exploit the process to overturn any unpopular regulations and frustrate the regulatory mission of agencies.[178]

MCR would both ensure that agencies have strong incentives to reassess

174. *See supra* note 108 and accompanying text.

175. *See* Regulatory Flexibility Act, 5 U.S.C. § 610 (2012) (requiring a periodic reevaluation of rules having "a significant economic impact upon a substantial number of small entities"); Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012); Exec. Order No. 13,579 § 2, 76 Fed. Reg. 41,587, 41,587 (July 14, 2011); Exec. Order No. 13,563 § 6, 76 Fed. Reg. 3821, 3822 (Jan. 18, 2011).

176. Bull, *supra* note 63, at 269.

177. ESKRIDGE, *supra* note 76, at 56–60.

178. *See generally* Bull, *supra* note 63 (describing a system that would permit regulated entities to challenge preexisting regulations through petitions for rulemaking but require such entities to offer a compelling alternative regulatory approach rather than merely raising objections to the existing framework).

existing regulations and leverage the expertise of stakeholders in determining which regulations are ripe for restructuring or retirement. For all new rules crafted via MCR procedures, the agency would follow an approach similar to the REFIT Initiative used by the European Commission.[179] Specifically, for each new rule, the agency would establish a timeline by which it will reassess the regulation and include a set of criteria by which it will judge the regulation's effectiveness—mindful of the fact that the relevant criteria may evolve over time.[180]

When formally reevaluating existing rules, agencies would essentially repeat the initial set of procedures associated with adopting a rule. Specifically, they would revisit the cost and benefit estimates associated with the initial regulatory impact assessment, determining whether they ultimately proved accurate.[181] Similarly, they would reexamine the scope of the regulation's economic impact and whether it disproportionately harmed a specific group of regulated entities, especially if the regulation has resulted in certain unanticipated consequences. Throughout this process, the agency would solicit input from relevant stakeholders, undertaking outreach efforts to promote participation by groups that may not otherwise traditionally have a major presence.[182]

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179. Amongst other things, the REFIT procedures require the European Commission to create a timeline for reassessing regulations and directives at the time of promulgation and to establish a set of criteria for reevaluating such laws. EUROPEAN COMMISSION, COM (2013) 686 FINAL, STRENGTHENING THE FOUNDATIONS OF SMART REGULATION – IMPROVING EVALUATION (Oct. 2, 2013), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0686.

180. *Id.*; *see also Adoption of Recommendations*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

181. *See* Coglianese, *supra* note 108, at 64–65 (noting the uncertainty associated with initial estimates of regulatory costs and benefits). Importantly, this process need not serve as a one-way ratchet, inevitably resulting in dilution of regulatory protections. In some instances, the regulatory costs may actually prove much smaller than initially anticipated (or the benefits prove significantly larger), potentially meriting ramping up the level of regulatory protection following the retrospective reanalysis. *See* Exec. Order No. 13,563 § 6, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2012) (contemplating the possibility that regulatory protections might be "expanded" in light of subsequently emerging information).

182. In this light, market corrective rulemaking (MCR) procedures would improve considerably upon those utilized in Europe. Though the European Commission provides that the evaluation process for reassessing existing laws shall be transparent, it has not erected any formal public participation process. EUROPEAN COMMISSION, PUBLIC CONSULTATION ON COMMISSION GUIDELINES FOR EVALUATION 17 (Nov. 2013), *available at* http://ec.europa.eu/smart-regulation/evaluation/docs/20131111_guidelines_pc_part_i_ii_clean.pdf (serving as the November 2013 draft of the report and mentioning a guideline for transparency, but not including a specific mechanism for public participation); *European Elections 2014: Transparency Must Be a Priority, MEPs Told*, ACCESS INFO (Oct. 2, 2013), http://www.access-info.org/eut/12290; Jens Steffek, *Civil Society Participation and Deliberative Democracy in the European Union*, E-INT'L RELATIONS (Mar. 21, 2014), http://www.e-ir.info/2014/03/21/civil-society-participation-and-deliberative-democracy-in-the-european-union/. Furthermore, when the Commission does reach out to

If the agency ultimately determines that the regulatory intervention must be pared back or eliminated, MCR would permit the agency to do so without seeking additional authorization from Congress. Though devolving such extensive powers upon administrative agencies raises concerns about potential violation of the non-delegation doctrine (Part IV.A ultimately concludes that the proposal passes constitutional muster), vesting this function in agencies helps minimize the risk of capture. Though the same logic concerning the enhanced participatory incentives of parties experiencing concentrated regulatory harms or benefits applies either to lobbying before Congress or participation in agency outreach efforts,[183] agency officials at least are unelected and therefore have a smaller incentive to curry favor with powerful interest groups.[184] Furthermore, the MCR procedures would significantly constrain agency officials' ability to enact new regulations or retain existing regulations merely to placate influential special interests: the stakeholder consultation requirements would mandate that agencies include a diverse set of participants capable of articulating the full range of relevant considerations, and aggrieved parties could challenge the resulting regulation for failure to observe the appropriate procedural requirements or for violating the principles of benefit maximization or proportionality.

Though the MCR procedures would not effectuate a complete cure for the problems of regulatory capture, and large industry groups would likely still enjoy a competitive advantage in influencing the agency, MCR would nevertheless draw upon best practices developed by both U.S. and EU regulators in minimizing this problem. In this light, the proposal compares favorably with other reform efforts that have unrealistically attempted to reclaim decisionmaking authority for Congress, which both undermines the benefits of specialized policymaking and ultimately increases the likelihood of capture.

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stakeholders, it tends to rely upon certain repeat players, as explored previously. *See supra* notes 146–47 and accompanying text.

183. ESKRIDGE, *supra* note 76, at 56–60.

184. Of course, agency officials may still have a strong incentive to ingratiate themselves with industry groups if they seek lucrative private sector employment upon departing the public sector, but this is true only of those officials who anticipate leaving government at some future date, and even purely self-interested bureaucrats must ensure that they act within the agency's statutory mandate. Edna Earle Vass Johnson, *Agency "Capture": The "Revolving Door" between Regulated Industries and Their Regulating Agencies*, 18 U. RICH. L. REV. 95, 95–96 (1983). By contrast, essentially one hundred percent of legislators are at least partially reliant upon corporate funding to achieve reelection. LAWRENCE LESSIG, ONE WAY FORWARD 40–43 (2012) ("With the system of campaign contributions and also with independent expenditures, we have allowed an economy to evolve in which our representatives are not 'dependent upon the People alone' but are instead dependent on the funders.").

C. Judicial Review of "Market Corrective Rulemaking"

At the outset, it is worthwhile to note that the invocation of MCR procedures would almost certainly serve as an invitation to aggrieved parties to challenge the resulting regulations on judicial review. Even under traditional notice-and-comment rulemaking procedures, regulatory challenges are legion, so much so that leading administrative law scholars have described the U.S. regulatory process as "ossified"[185] and "broken."[186] MCR would add a number of arrows to the quiver of regulatory opponents. First, unlike cost-benefit analyses conducted pursuant to Executive Order 12,866, which cannot serve as the basis of a direct judicial challenge—though the cost-benefit analysis becomes part of the rulemaking record that a court reviews[187]—a regulated entity could directly challenge a rule crafted under MCR procedures for failure to maximize net benefits. As recent cases such as *Business Roundtable v. Securities & Exchange Commission*[188] illustrate, challenges alleging that an agency overlooked relevant evidence in its assessment of regulatory costs and benefits can be a powerful strategy for overturning agency determinations.[189] Second, MCR would add an entirely new basis upon which to challenge a rule: even if an agency effectively demonstrated that it had maximized net benefits, a

185. *See, e.g.*, McGarity, *supra* note 103, at 1400–03, 1410–26 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 59–60 (1995); Paul R. Verkuil, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 453 (1995).

186. *See, e.g.*, Rena Steinzor, *OMB Nominee Jacob Lew, Meet Broken Regulatory State*, CPRBLOG (Sept. 16, 2010), http://www.progressivereform.org/CPRBlog.cfm?idBlog=1A88219B-F6A0-E131-CA820C349522F530 ("The pattern is clear for anyone who is looking. These are systemic regulatory failures, signs of government and specifically federal agencies (FDA, EPA, MMS, NHTSA, OSHA, CPSC) not able to accomplish their missions of protecting the public."); *cf.* Cary Coglianese, *Has the U.S. Regulatory System Broken Down?*, REGBLOG (Oct. 1, 2012), http://www.regblog.org/2012/10/01-coglianese-regulatory-breakdown.html ("Has the United States suffered a regulatory breakdown? The answer to this question would appear to be an obvious 'yes.' . . . But in truth, the regulatory system is far less clearly to blame than most of us think.").

187. *See* Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (noting that when an agency utilizes cost-benefit analysis in rulemaking, "a serious flaw undermining that analysis can render the rule unreasonable."); Exec. Order No. 12,866 § 10, 58 Fed. Reg. 51,735, 51,744 (Oct. 4, 1993).

188. 647 F.3d 1144 (D.C. Cir. 2011).

189. *Id.* at 1149–51 (identifying flaws in the cost-benefit analysis conducted by the Securities and Exchange Commission (SEC) in connection with the proxy access rule); *see also* Chamber of Commerce of the United States of Am. v. SEC, 412 F.3d 133, 143–44 (D.C. Cir. 2005) (same); PAUL ROSE & CHRISTOPHER J. WALKER, CTR. FOR CAPITAL MKTS., THE IMPORTANCE OF COST-BENEFIT ANALYSIS IN FINANCIAL REGULATION 8–11 (Mar. 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231314 ("Over the past several years, . . . financial regulators have come under increasing pressure to improve the quality of their cost-benefit analysis and move closer to the OMB guidelines applicable to other agencies.").

regulated entity still might contend that the agency's actions were excessively disruptive of underlying market forces and violated the principle of proportionality. Finally, MCR would impose novel stakeholder outreach requirements upon agencies, including a duty to actively solicit input from a wide array of entities both in crafting a new rule and reassessing an existing rule. MCR would extend APA § 553(c)'s requirement that agencies consider the "relevant matter presented" to any public input received during this stakeholder outreach process. Accordingly, regulated entities might challenge an agency's actions for failure to observe those procedures or to give proper consideration to information submitted during that process.

In this light, it is beyond doubt that rules adopted via MCR procedures would be more susceptible to challenge, and therefore more likely to be overturned on judicial review, than their counterparts promulgated under traditional informal rulemaking procedures. On the one hand, this creates considerable costs for the public and regulated entities alike. If government intervention is truly required to correct a market failure, then the public must continue to endure the resulting inefficiency while regulated entities battle agencies over the precise dimensions of the regulatory solution. Furthermore, regulated entities themselves may prefer a greater degree of certainty in many instances: businesses structure their investment decisions in light of the future regulatory environment they anticipate, and market uncertainty arising from agency trial-and-error in devising a rule that will survive judicial review can impose significant economic costs.[190]

On the other hand, MCR procedures would facilitate a form of "regulatory experimentalism" that would provide enormous benefits in minimizing unnecessary interventions into the free market.[191] Indeed, one

190. F.A. Hayek proclaimed the virtues of such certainty for regulated entities:

> Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.

HAYEK, *supra* note 11, at 112.

191. Numerous administrative law scholars have, in recent years, strongly advocated reforms designed to facilitate "regulatory experimentation," allowing regulators to tailor and readjust regulatory programs over time. *See generally, e.g.*, Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, *in* NEW PERSPECTIVES ON REGULATION 113, 113 (David Moss & John Cisternino eds., 2009); SUNSTEIN, *supra* note 109, at 186–89; Robin Kundis Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1 (2014); Zachary J. Gubler, *Making Experimental Rules Work*, 67 Admin. L. Rev. 551 (2015); Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129 (2014); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the*

can conceive of the judicial challenges to agency determinations as a form of "public-private partnership," effectively deputizing private parties to ensure that the agencies consider all relevant information in the initial instance and that they continue to reevaluate the rule adopted and readjust it as necessary to respond to evolving market dynamics.[192]

In short, by invoking MCR, Congress is effectively expressing its willingness to tolerate some level of increased uncertainty in exchange for the benefits arising from a more responsive, dynamic regulatory process. As such, its decision to deploy MCR procedures should be informed by a careful analysis of the regulatory problem. If the market failure is longstanding and unlikely to resolve over time,[193] or if businesses require a high degree of certainty to structure their investment decisions, the level of instability associated with MCR procedures may counsel in favor of using traditional informal rulemaking procedures instead. If, on the other hand, the market failure appears to be one that could abate or disappear over time and the regulated parties can brook some level of uncertainty in exchange for a more responsive regulatory system, then MCR procedures may prove optimal.

Furthermore, given that MCR itself represents an exercise in "regulatory experimentalism," the stringency of judicial review might be readjusted by statute, depending upon the level of uncertainty of surrounding rules adopted under those procedures. As an initial matter, courts should generally tender a very high level of deference to an agency's substantive determinations. As explored in Part I, Congress has already largely delegated the role of weighing the economic costs and benefits of regulatory

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Administrative State, 100 GEO. L.J. 53 (2011).

192. *See* SEAN FARHANG, THE LITIGATION STATE 8 (2010) ("The standing statutorily conferred on private actors to enforce public regulatory laws in court effectively licenses them to wield the coercive instruments of state power.").

193. For instance, intellectual property laws correct for a fundamental flaw in "information markets": ideas are non-rivalrous and essentially infinitely reproducible at a trivial cost, and it is therefore difficult to ensure any incentive for their continued production—a classic public goods problem. Bruce Abramson, *Promoting Innovation in the Software Industry: A First Principles Approach to Intellectual Property Reform*, 8 B.U. J. SCI. & TECH. L. 75, 92 (2002); Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1337 (1987). This market flaw is unlikely to self-correct in the near future, and some level of patent and copyright protection is therefore likely necessary to ensure a robust marketplace in ideas. By contrast, temporary monopolies arising from "first mover advantage" do generally resolve over time. For instance, though railroads once exercised a near monopoly on interstate travel—and ultimately faced extensive regulation as a consequence—the rise of airplane and automobile transport rendered this monopoly obsolete. Unsurprisingly, the regulatory response survived far beyond the underlying market failure: the Interstate Commerce Commission, which first arose to regulate rail rates, did not formally cease operations until 1995. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

interventions to agency officials,[194] and it would explicitly and fully delegate that function upon invoking MCR. For reasons both of deference to Congress's delegation of powers[195] and of the impropriety of generalist judges' second-guessing the determinations of agency economists, courts should not generally reweigh the factors examined by the agency in conducting its cost-benefit and proportionality analyses.[196] The overall approach would resemble that announced by the D.C. Circuit for agency scientific determinations in *Ethyl Corp. v. Environmental Protection Agency*[197]: courts should merely ensure that the agencies observed all procedural requirements rather than attempting to draw independent conclusions from the underlying technical data.[198] Thus, in reviewing an agency's cost-benefit analysis, the court would merely ensure that the agency considered all relevant information in the rulemaking record in reaching its ultimate determination. For the proportionality analysis, the court would ensure that the agency considered relevant evidence of economic displacement caused by a regulatory intervention, especially for exceedingly costly regulations, but it would not attempt to reassess the underlying evidence or second-guess an agency's decision to tolerate greater economic

194. *See supra* Part I. Indeed, in light of the pervasive nature of cost-benefit analysis requirements created by Executive Order 12,291 and its progeny, some scholars have urged federal courts to apply a presumption in favor of cost-benefit analysis, interpreting silent or ambiguous statutes to require some analysis of regulatory costs and benefits unless they explicitly provide otherwise. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981); CASS R. SUNSTEIN, THE COST-BENEFIT STATE 59–60 (2002); Jonathan Cannon, *The Sounds of Silence: Cost-Benefit Canons in* Entergy Corp. v. Riverkeeper, Inc., 34 HARV. ENVTL. L. REV. 425, 433 (2010); Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1692 (2001).

195. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

196. *See* Robert B. Ahdieh, *Re-Analyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, N.Y.U. L. REV. ONLINE, http://www.nyulawreview.org/online-features/re-analyzing-cost-benefit-analysis-toward-framework-functions-and-forms (last visited Nov. 2, 2015) (arguing in favor of a highly deferential, procedurally focused standard of review for rules enacted pursuant to § 106 of the National Securities Market Improvement Act).

197. 541 F.2d 1 (D.C. Cir. 1976).

198. *See id.* at 36 ("The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise."); Jud Mathews, *Agency Discretion, Judicial Review, and "Proportionality" in U.S. Administrative Law*, *in* THE JUDGE AND PROPORTIONATE USE OF DISCRETION 189 (Sofia Ranchordás & Boudewijn de Waard eds., 2015) ("There is a tendency in American administrative law to proceduralize substantive review. Even though the Supreme Court in *Vermont Yankee* stopped courts from imposing on agencies additional procedural requirements, such as hearings, reviewing courts still have a tendency to describe the faults they find with agency choices in terms of the agency's decision-making process.").

displacement in order to maximize net regulatory benefits—or vice versa.[199]

On procedural matters, by contrast, the judicial inquiry should be more searching, as it has traditionally been under the "arbitrary and capricious" standard.[200] First, courts should ensure that the agency observed all stakeholder outreach obligations, including formal opportunities for public input in the rule formation and reevaluation processes. Second, courts should demand that agencies actually pay heed to the information submitted and respond to relevant stakeholder input, ensuring that the agencies account for "relevant matter presented" as they currently must for information submitted via the notice-and-comment process.[201]

Finally, and most delicately, courts should scrutinize the set of stakeholders participating in the public input process to ensure that the agency has maintained an appropriate balance of interests. The closest analogy to this requirement would be the balance provisions of FACA.[202] Courts that have reviewed challenges to advisory committee composition under these provisions have either held that the balance requirements are nonjusticiable or tendered a very high degree of deference to the agency's selection of committee members.[203] Some level of judicial review is necessary to preserve the incentive to seek out diverse stakeholder input. Nevertheless, the courts should apply the very high level of deference exhibited in FACA cases that have found the balance inquiry justiciable, given the difficulty of identifying all stakeholder groups with a material

199. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."); Mathews, *supra* note 198, at 189 (suggesting that the Supreme Court has, in recent years, taken a step back from the probing "hard look" review applied in *State Farm* and other cases).

200. *See, e.g.*, *Ethyl*, 541 F.2d at 67 (Bazelon, C.J., concurring) ("Because substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decision-making by concentrating our efforts on strengthening administrative procedures. . . ."); *see also* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 377, 385 (1989); Wis. Valley Improvement v. Fed. Energy Regulatory Comm'n, 236 F.3d 738, 747 (D.C. Cir. 2001); Fla. Cellular Mobile Commc'ns Corp. v. Fed. Commc'ns Comm'n, 28 F.3d 191, 193, 197 (D.C. Cir. 1994).

201. 5 U.S.C. § 553(c) (2012).

202. Pub. L. 92-463 (codified as amended in 5 U.S.C. app.).

203. *See* Ctr. for Policy Analysis on Trade & Health v. USTR, 540 F.3d 940, 945–46 (9th Cir. 2008) (holding that FACA and a separate statute appertaining to a committee's work did not provide sufficient detail on the dimensions on which balance must be achieved so as to support a justiciable claim, though acknowledging that a separate statute could provide sufficient supplementary detail in another case); Colo. Envtl. Coal. v. Wenker, 353 F.3d 1221, 1232–33 (10th Cir. 2004) (concluding that FACA's balance requirements are justiciable); Cargill, Inc. v. United States, 173 F.3d 323, 334–35 (5th Cir. 1999) ("We conclude that the functional balance and adequate staffing requirements, while subject to a deferential standard of review, are justiciable."); *see also* BULL, *supra* note 153, at 24.

interest in a proposed regulatory intervention.[204]

If this initial framework for judicial review proves either overly disruptive to agency operations or insufficient to ensure proper solicitousness of stakeholder input, Congress can always readjust the level of deference by statute.

IV. POTENTIAL OBJECTIONS AND RESPONSES

A. *Non-Delegation Doctrine*

Cass Sunstein has wryly remarked that, in the history of our constitutional republic, the non-delegation doctrine has had "one good year" (1935), and, by implication, over two hundred bad years wherein it has effectively been ignored.[205] The two cases in which the Court found a violation of the doctrine, *Panama Refining Co. v. Ryan*[206] and *A.L.A. Schechter Poultry Corp. v. United States*,[207] both applied a formalistic distinction between "legislative" functions, which must be retained by Congress, and "executive" functions, which can be delegated to administrative agencies.[208] In Justice Cardozo's concurrence in *Schechter*, he elaborated on the nature of delegations that run afoul of the doctrine, contending that the National Industrial Recovery Act effectively created a "roving commission to inquire into evils and upon discovery correct them."[209]

In one sense, agencies delegated broad regulatory authority pursuant to MCR procedures resemble the "roving commissions" Justice Cardozo inveighed against in *Schechter*. Congress need only vaguely identify a market failure that it wishes to address, and the agency is then fully responsible for investigating the scope of the market failure, devising a narrowly tailored intervention, reevaluating the associated regulation(s) over time, and

204. For instance, adopting a rule designed to control carbon emissions clearly affects power plants and environmental organizations. Less obviously, it also affects manufacturers (who may not pollute directly but who rely upon inexpensive power) and consumers (who may pay higher prices if the price of power increases). Less obviously still, it more indirectly affects farmers (who may endure especially severe fallout from climate change), residents of coastal communities (who would suffer most directly from rising sea levels), and outdoor enthusiasts (whose recreational havens may be damaged by a warming climate). The question of how direct a group's connection must be to merit special outreach by the agency is a challenging one, and courts should therefore largely defer to the agency.

205. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

206. 293 U.S. 388 (1935).

207. 295 U.S. 495 (1935).

208. *Id.* at 529 ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested."); Panama Ref. Co. v. Ryan, 293 U.S. at 421 ("The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested.").

209. 295 U.S. at 551 (Cardozo, J., concurring).

terminating the intervention when it determines that the market has evolved sufficiently to function efficiently sans governmental interference. Furthermore, if taken to its extreme implications, the type of procedure authorized by MCR could severely blur the boundaries between legislative and executive functions: one might envision a scenario whereby Congress effectively delegated carte blanche authority to agencies to regulate in the "public interest" and to terminate regulatory interventions when the agencies deem proper, thereby almost completely abdicating the legislative role.

Nevertheless, this *reductio ad absurdum* applies to essentially any broad delegation of policymaking powers to agencies, and a closer analysis shows that delegations associated with MCR are likely considerably narrower than many sanctioned by courts in the past. For instance, in *Yakus v. United States*,[210] the Court upheld an act granting an executive official the power to set maximum prices for commodities that "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."[211] In *Whitman v. American Trucking Associations, Inc.*,[212] the Court explicitly stated that it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[213] In comparison to cases such as *Yakus*, the delegation contemplated in MCR procedures is relatively modest. First, Congress must identify the market failure that it intends the agency to resolve, rather than generally tasking the agency with acting so as to promote some numinous principle such as "fairness" or "equity." Second, Congress sets forth the policies that will guide the agency's determination, requiring both cost-benefit and proportionality analysis of any proposed regulation. Finally, Congress erects a formal set of procedures that agencies must observe in promulgating any rule under MCR, and courts are empowered to set aside agency determinations for failure to follow those procedures.

Nonetheless, the delegation associated with MCR arguably goes further than delegations upheld in past cases insofar as MCR tasks the agency with deciding when to terminate a market intervention. Notwithstanding this distinction, MCR procedures almost certainly pass constitutional muster. First, non-delegation case law contains no indication that authorizing an agency to terminate a regulatory intervention is constitutionally impermissible. Second, MCR procedures can be conceived of as a

210. 321 U.S. 414 (1944).

211. *Id.* at 420, 426 (internal quotation marks omitted).

212. 531 U.S. 457 (2001).

213. *Id.* at 474–75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

conditional grant of authority by Congress, rather than a delegation of the authority to terminate a Congressionally mandated program. Essentially, upon invoking MCR procedures, Congress has authorized an agency to regulate to correct a given market failure so long as the agency finds evidence to denote that the market failure persists. Congress also sets forth the general methodology by which the agency will reassess the regulation—i.e., cost-benefit and proportionality analyses—and it has implicitly directed the agency to terminate the intervention when the agency's reassessment no longer produces evidence of continued need. In this sense, MCR is no different from Congress authorizing the Federal Reserve to initiate or terminate a bond-purchasing campaign upon its assessment of the health of the underlying economy[214] or upon any number of run-of-the-mill delegations granting conditional powers to agencies.

B. Lochner *2.0?*

In the early decades of the twentieth century, the Supreme Court briefly stood athwart the Progressive Era demand for regulatory interventions designed to control the alleged depredations of captains of industry. In that period, the Court erected a framework by which no level of government could effectively intervene in the economy on behalf of its citizens: the Court's crabbed reading of the Commerce Clause deprived Congress of the power to enact nationwide solutions to perceived market failures[215]—creating a risk of "races to the bottom" in individual states—and the Court applied an exceedingly aggressive reading of "liberty of contract" to strike down similar efforts by individual states.[216] The end of the so-called *Lochner* era and the resulting abandonment of judicial efforts to rein in the powers of national and state governments to intervene in the economy in service of the "public good" have cast a long shadow, bringing any efforts to delimit the state's power to correct perceived market flaws into discredit. In this light, some may criticize MCR as a throwback to this reviled age, effectively empowering the courts to strike down public-spirited regulations at the behest of industry.

The distinctions between MCR and *Lochner* era restrictions are, of course, clear: the *Lochner* era Court interpreted the U.S. Constitution to

214. 12 U.S.C. § 355 (2012).

215. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 298–99 (1936) (limiting the scope of Congress's Interstate Commerce Clause authority to the regulation of transactions that occur across state lines); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (holding that Congress lacks authority to regulate commerce when the interstate effects are merely indirect).

216. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905) ("The right to purchase or to sell labor is part of the liberty protected by [the Fourteenth Amendment].").

prohibit efforts by Congress to legislate in the public interest; MCR preserves Congress's nearly carte blanche authority to regulate the national economy, merely creating an *optional* set of procedures by which it can restrict its delegations to agencies as it deems appropriate. Indeed, MCR is best perceived not as a limitation on the authority of either Congress or administrative agencies but as a mechanism by which the former can more effectively communicate its intent to the latter. One can reasonably assume that members of Congress do not intend for laws enacted to respond to short-term crises to survive well-beyond their useful lifespan, but current administrative procedures largely lack any effective mechanism for effectuating a conditional, temporary delegation of authority to agencies to respond to what may ultimately prove to be illusory or evanescent market failures. MCR seeks to solve that problem while retaining Congress's authority to erect permanent market interventions.

Nevertheless, though the *Lochner* analogy is perhaps inapt, the broader objection still stands: MCR represents an effort to constrain efforts by government actors to correct perceived market failures in the name of the "public interest" without regard for the economic dislocations their actions may cause. Indeed, given the availability of MCR procedures, legislators may become increasingly wary of traditional, open-ended delegations to agencies and demand that all future statutes designed to correct market failures invoke MCR procedures. The question then becomes whether this innovation leads to normatively desirable results.

In analyzing the problem, it is worth reflecting on the prevailing state of affairs. Without oversimplifying too grossly, the current landscape in Congress resembles a Manichean conflict between one party that holds all regulatory interventions sacrosanct and another that considers the same interventions utterly abominable. Notwithstanding a recent series of salient failures of the unregulated market, including the largest marine oil spill in history and an economic collapse arguably precipitated by excessively weak financial regulations, Congressional conservatives have predominantly opposed any expansion of the federal government's regulatory role.[217] Congressional progressives, in turn, often ignore even flagrant instances of bureaucratic incompetence.[218]

Though such conflicts reflect deeply-held convictions concerning the relative proficiency of government actors and unregulated market players and are unlikely to disappear any time soon, the virtual irreversibility of regulatory interventions also greatly complicates the picture. In this light,

217. Christopher Carrigan & Cary Coglianese, *Oversight in Hindsight: Assessing the U.S. Regulatory System in the Wake of Calamity*, *in* REGULATORY BREAKDOWN 1, 1–3 (Cary Coglianese ed., 2012).

218. *See supra* note 22 and accompanying text.

MCR may help alleviate this intense partisan gridlock insofar as it creates a viable centrist alternative: government intervenes to correct perceived market failures, but it implements a formal set of procedures by which that intervention must be modified or revoked if evidence later emerges that it has become overly burdensome or unnecessary. In this sense, MCR is in keeping with the recent scholarly advocacy in favor of "regulatory experimentation."[219] As F.A. Hayek contended, it is exceedingly difficult for a small coterie of government officials to gain a comprehensive understanding of a complex regulatory issue, and it is virtually inconceivable that they possess the foresight to anticipate how their chosen regulatory intervention will respond to evolving market forces.[220] Hayek's preferred alternative is minimizing government intrusion into the free market,[221] yet a similar result might be achieved by proffering agency officials the discretion required to readjust regulatory interventions and by creating an oversight mechanism by which stakeholders can police this far-ranging discretion.

Of course, MCR procedures are not a comprehensive solution to the ills of the modern regulatory state. Though the increased flexibility would facilitate empirical learning and enhanced regulatory responsiveness, it would also create some degree of uncertainty, which can prove especially problematic for businesses attempting to adjust their investment decisions in light of the anticipated regulatory landscape.[222] In addition, given their enormous financial resources and greater incentive to participate closely in agency policymaking,[223] industry groups would likely continue to enjoy a competitive advantage vis-à-vis other stakeholder groups, notwithstanding the explicit requirement that agencies seek out input from underrepresented parties under MCR procedures. Nevertheless, in certain contexts, the increased uncertainty associated with MCR procedures may be more than offset by the benefits of regulatory dynamism.

CONCLUSION

In recent years, the only point of consensus between the political left and right is the observation that the modern regulatory state has ceased to function efficiently: conservatives see a metastasizing bureaucracy intent upon expanding its influence at the expense of the private sector, whereas

219. *See supra* note 191 and accompanying text.

220. HAYEK, *supra* note 11, at 95.

221. *Id.*

222. *See, e.g.*, Andrew B. Whitford, *The Reduction of Regulatory Uncertainty: Evidence from Transfer Pricing Policy*, 55 ST. LOUIS U. L.J. 269, 269–70 (2010) (stating that regulatory uncertainty can make or break a business).

223. ESKRIDGE, *supra* note 76, at 56–60.

progressives see a regulatory state that has become so constrained by procedural strictures and incessant regulatory challenges that it can no longer effectively serve the public interest. Of the various solutions put forward by scholars and politicians on both sides of the debate, looking "across the pond" for comparative insights has certainly not been at the top of the list. While acknowledging the significant flaws in the European approach and the European Union's frequent failure to live up to its own aspirations, this Article has attempted to draw best practices from the EU system and translate them into reforms that may help alleviate the partisan warfare concerning the federal government's proper role in the economy. The proposed system of MCR would not prove ideal in all circumstances, but it would open a new avenue for regulatory experimentation and enable targeted, narrowly tailored responses to perceived market failures. Furthermore, since its use would lie entirely within the discretion of Congress, it need not be invoked in contexts in which it is infeasible or undesirable. Though by no means a panacea, MCR would enable a more iterative approach to resolving market failures and ideally blaze a medium between the pro- and anti-regulatory partisan extremes.